NO. _____

78-117

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

GRAY-TAYLOR, INC., etc.,
Petitioner

v.

HARRIS COUNTY, et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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SUBJECT INDEX

LIST OF AUTHORITIES

NO. _____

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Gray-Taylor, Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit affirming a judgment of the United States District Court for the Southern District of Texas (Houston Division).

OPINIONS BELOW

The Court of Appeals for the Fifth Circuit entered a per curiam affirmance of the District Court's judgment. The Court of Appeals' affirmance is reported at 569 F.2d 893,

and is reproduced as Appendix A, infra, pp. A-1 - A-2. The Court of Appeals' denial of the petition for rehearing is not reported and is reproduced as Appendix B, infra, p. B-1. The District Court's Order of Dismissal is not reported and is reproduced as Appendix C, infra, pp. C-1 - C-3. The United States Magistrate's Memorandum and Recommendation upon which the District Court relied is not reported and is reproduced as Appendix D, infra, pp. D-1 - D-16.

JURISDICTION

The judgment below was entered on March 16, 1978. (Appendix E, infra, p. E-1.) A timely petition for rehearing was denied by order dated April 24, 1978. (Appendix B, infra, p. B-1.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether, in a suit seeking relief from alleged discriminatory implementation of local property tax plans and properly alleging jurisdiction under the Civil Rights Statutes, the court of appeals correctly invoked *Burford* abstention without first making preliminary findings (1) that the case raised complex issues of state law which, if resolved by a Federal Court, would disrupt state efforts to establish a uniform policy on a matter of substantial local concern and (2) that the state provided an adequate remedy for the redress of the petitioner's Federal constitutional claims?

2. Whether, in any event, *Burford* abstention is properly invoked to deny a Federal forum with respect to the request for damages for past alleged unconstitutional plans (as opposed to the request for injunctive relief)?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment to the Constitution of the United States of America and its implementing legislation (42 U.S.C. § 1983 and 28 U.S.C. § 1343(3)) are involved. The Tax Injunction Act (28 U.S.C. § 1341) is also involved. Finally, Article VIII, § 1 of the Texas Constitution and its implementing legislation (Tex. Rev. Civ. Stat. Ann. Art. 7145) are involved. These provisions are set forth in Appendix F, *infra*.

STATEMENT

The petitioner is a corporation having its principal place of business in Harris County, Texas, and is subject to the property tax imposed by Harris County. The respondents are Harris County and certain officials of Harris County responsible for the administration of the Harris County property tax.

The Constitution of the State of Texas (Article VIII, Section 1) and implementing legislation (Tex. Rev. Civ. Stat. Ann., Article 7145) require that all property, not otherwise specifically exempted, be included on the property tax rolls and taxed. The petitioner alleged in its complaint that the respondents, acting separately and in concert, have failed to take reasonable measures to ensure compliance with this mandate, with the result that whole categories of personal property—such as corporate stock, bank and savings deposits, accounts receivable and personal automobiles—are routinely and illegally exempted from taxation by administrative inaction. As a consequence, persons owning property of the type that the respondents vigorously tax bear a higher burden of

the cost of government of Harris County than would be required if the respondents adopted reasonable measures to ensure that all categories of nonexempt property are taxed.

In order to protest the continuation of this illegal scheme of taxation, the petitioner and others pursued all available administrative remedies without success. Failing in this effort, the petitioner filed the complaint in the instant action.

In its complaint, as amended, the petitioner sought injunctive relief against future implementation of discriminatory property tax plans and damages for past implementation of discriminatory property tax plans. The petitioner alleged jurisdiction under the Civil Rights Statutes (42 U.S.C. § 1983 and 28 U.S.C. § 1343(3)) on the basis that the respondents' failure to adopt reasonable measures to ensure compliance with the mandate that all nonexempt property be taxed, while vigorously taxing the petitioner's property, denied to the petitioner and all persons similarly situated the equal protection of the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States of America.

The magistrate to whom the case was assigned recommended that the complaint be dismissed because the relief requested was barred by the Tax Injunction Act (28 U.S.C. § 1341) and because *Pullman* principles as applied in *Harris County Commissioners Court v. Moore*, 420 U.S. 77 (1975), required abstention. (App., infra, pp. D-1 - D-16.) The district court then dismissed on the basis of the magistrate's conclusions with respect to abstention. (App., infra, pp. C-1 - C-3.)

Upon the petitioner's appeal, the court of appeals affirmed but not on any basis cited by the district court or by the magistrate. Rather, the court of appeals, *sua sponte*, invoked *Burford* abstention (*Burford v. Sun Oil Co.*, 319 U.S. 315 (1943)) as grounds for affirming the dismissal. (App., infra, pp. A-1 - A-2.)

REASONS FOR GRANTING THE WRIT

1. The court of appeals improperly invoked *Burford* abstention. Preliminary to the application of any doctrine of abstention, Federal jurisdiction must be properly pleaded. Here, there has never been any question that the complaint properly pleads Federal jurisdiction under the Civil Rights Statutes (42 U.S.C. § 1983 and 28 U.S.C. § 1343(3)). See e.g., *Garrett v. Bamford*, 538 F.2d 63 (C.A. 3, 1976), cert. denied 429 U.S. 977 (1976); and *Weissinger v. Boswell*, 330 F.Supp. 615 (M.D. Ala., 1971) (Three Judge Court). The right the petitioner seeks to vindicate here, therefore, requires the most exigent of circumstances before a Federal court may properly abstain. E.g., *Moreno v. Henckel*, 431 F.2d 1299, 1301 (C.A. 5, 1970); and *Wright v. McMann*, 387 F.2d 519, 525 (C.A. 2, 1967).

The court of appeals stated two considerations in the invocation of *Burford*. The first stated consideration—the pendency of a parallel state court proceeding[1]—

1. The parallel state court proceeding was instituted by another taxpayer, but does represent a concerted effort by a group of taxpayers having a common interest in having the Harris County property tax plan implemented in a legal fashion. Although, as shall be made apparent later in this petition, we feel the state forum does not offer an adequate remedy for the grievance raised here, we as attorneys advised the taxpayers seeking to redress the grievance that parallel proceedings would be required to protect against the possibility that the Federal courts might decline to exercise jurisdiction.

was rejected as a controlling consideration in the invocation of *Burford* abstention in *Colorado River Water Conserv. Dist. v. United States,* 424 U.S. 800 (1976). The court of appeals' other stated consideration—avoidance of needless conflict in a state's internal affairs—appears to be nothing more than the invocation of a talisman as a substitute for the analysis required by *Burford.*

The court of appeals' decision, read literally, suggests the startling conclusion that discriminatory implementation of a local property tax plan is always beyond review of the Federal courts. This is plainly wrong, and little in the way of rebuttal is necessary other than to cite the many cases in which this Court and other courts (including the court below) have been required to apply other principles of federalism (e.g., the traditional equity rule or the Tax Injunction Act (28 U.S.C. § 1341)) in determining whether the exercise of Federal jurisdiction to review local property tax plans was proper. E.g., *Tully v. Griffin,* 429 U.S. 68 (1976); *Hillsborough Township, Somerset County, N. J., et al. v. Cromwell,* 326 U.S. 620 (1946); *Bland v. McHann,* 463 F.2d 21 (C.A. 5, 1972), cert. denied, 410 U.S. 966 (1973); *Garrett v. Bamford, supra;* and *Weissinger v. Boswell,* 330 F.2d 615 (M.D. Ala., 1971) (Three Judge Court). The court of appeals' blanket application of *Burford* renders these other principles superfluous and the various courts' application of them an exercise in futility.

Burford, of course, requires more than the mere conclusion that a traditionally local issue is involved and that Federal court review may require intervention in this area. Specifically, *Burford* requires the presence of "complex

issues of state law, resolution of which would be 'disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.' " *Zablocki v. Redhail,* 429 U.S. 1089, 98 S.Ct. 673, 678 n. 5 (1978). In *Burford,* this Court considered a complex regulatory scheme for oil and gas, which was and is perhaps the fundamental component of Texas' economy. The Texas legislature sought to fine-tune the balance between the public good and private right through a complex scheme involving initially purely administrative consideration by the Texas Railroad Commission followed by court review. In essence, under the scheme the state courts became in many respects extensions of the administrative process, rather than serving solely a judicial capacity of determining whether the Commission's actions were consistent with the law; in the words of this Court, the Railroad Commission and the state courts were "working partners" in the regulatory process. (319 U.S. at 326.) Furthermore, in this process, this Court found the judicial remedy to be "thorough" and "expeditious and adequate." (319 U.S. at 325 and 334.)

In contrast to *Burford,* this case raises no complex issue of state law or policy, but seeks instead the implementation of clearly declared state law and policy to tax all non-exempt property uniformly. See Texas Constitution Article VIII, Section 1, Tex. Rev. Civ. Stat. Ann. Art. 7145. Selective enforcement of the property tax through the deliberate omission of whole categories of personal property constitutes "the rankest kind of discrimination between taxpayers." *City of Arlington v. Cannon,* 153 Tex. 566, 271 S.W.2d 414, 416 (1954). Such a plan must necessarily also violate the equal protection guaranty of the Fourteenth Amendment to the Constitution of the

United States. E.g., *Garrett v. Bamford, supra; Weissinger v. Boswell, supra.* This suit seeks to test the tax administrators' efforts against this standard set by clearly declared state law and hence required by the Fourteenth Amendment.

Moreover, as with the other principles of federalism that could possibly apply here (the traditional equity rule and the Tax Injunction Act), *Burford* abstention requires a specific finding that the state remedy to which the complainant is being relegated be adequate. In *Burford,* the Court was careful to find the state remedy "thorough" and "expeditious and adequate." (319 U.S. at 325 and 334). Yet, the court of appeals here did not make a finding of adequacy nor did it even indicate that it considered the issue. Indeed, since the parties fully briefed the application of the Tax Injunction Act which requires a finding of adequacy of the state remedy, the court of appeals' failure to cite that Act as an alternative basis for its holding suggests that it did not make that finding; in other words, had the court of appeals found the state remedy adequate, it would seemingly have so stated and relied in part upon the Tax Injunction Act.[2]

This Court has repeatedly held that even uncertainty as to the adequacy of the state remedy will preclude dismissal of the Federal case under the traditional equity

2. The district court below indicated that, had it been called upon to decide the adequacy of the State remedy, it would have found the remedy adequate, but the court did not state its reasoning for this conclusion. (See Appendix, *infra,* p. C-3.) The magistrate also reached that conclusion relying principally upon Fifth Circuit precedents. (See Appendix, *infra,* pp. D-12 - D-13.) The petitioner contested that conclusion before the court of appeals, distinguishing its prior precedents and attacking the current viability of the conclusion. The court of appeals apparently chose to side-step the issue.

rule and under the Tax Injunction Act, which seem to parallel *Burford* in this respect. See *Hillsborough Township, Somerset County, N. J., et al. v. Cromwell, supra; Spector Motor Service v. O'Connor,* 340 U.S. 602, 605 (1951); and *Tully v. Griffin,* 429 U.S. 68, 97 S.Ct. 219, 224 (1976). Hence, the failure to make an affirmative finding of adequacy of the state remedy casts serious doubt upon the propriety of the court of appeals' affirmance.

While demonstrating in detail the considerations establishing the inadequacy of the state remedy is beyond the scope of this petition, we think it important that the most recent in depth, independent analyses confirm this conclusion. See Yudof, *The Property Tax in Texas under State and Federal Law,* 51 Tex. L. Rev. 885 (1973); and Special Legislative Report on *Intangibles and the Property Tax* (House Study Group, Texas House of Representatives: January 23, 1978), attached as Appendix G, infra, pp. G-1 - G-32. Critically, the latter study concludes that, despite much litigation on the subject (p. G-17, infra):

> * * * none of the decisions [of the Texas Courts] has included a requirement that the state or a local tax district revamp its tax system to include intangibles. The result has been that intangibles theoretically must be taxed but in practice can be overlooked. Only 2% of the assessed property in the state in intangible, although as much as half of the wealth in the state in intangible property.

It is also quite significant that the stimulus for this Special Legislative Report was the danger of court intervention to correct the blatant abuse; the danger perceived, however, arose from the Federal courts, not the

State courts. Specifically, in *Wilson v. Brockette*, (W.D. Tex. No. A-76-CA-233), the plaintiffs complained of the allocation of state educational funds on the basis of local property tax rolls, which in theory at least (assuming the inclusion on the rolls of all property as required by law) would have allocated state funds inversely in proportion to ability of local jurisdictions to support education. In fact, widespread omission of whole categories of personal property (principally intangibles) resulted in the shifting of state funds from the poorer districts (which had proportionately more real property on the rolls) to wealthier districts (which had proportionately less on the rolls), so that the legislature's yardstick of ability to pay—the local property tax rolls—resulted in a discriminatory allocation of state funds. In denying a request for a temporary injunction, the court indicated clearly that, upon ultimate disposition of the case, it would likely hold property tax omissions violative of state and Federal constitutions thereby making the school fund allocation equally deficient. (See the district court's order reproduced as Appendix H, *infra*, pp. H-1 - H-9.) The House Study Group concluded that upon final disposition of the case the Federal court could require the inclusion on the rolls of the omitted property or require a new standard for allocation of school funds.

Moreover, the only conceivably adequate state court remedy is the remedy applied in *City of Houston v. Baker*, 178 S.W. 820 (Tex. Civ. App.—Galveston 1915, writ ref'd), involving a combination of injunction of the illegal plan and mandamusing implementation of a legal, nondiscriminatory plan. Beyond the fact that, as Professor Yudof's extensive analysis indicates, the Texas courts have paid lip service only to the availability of this

remedy, this Court suggested in *Hillsborough Township, Somerset County, N. J., et al. v. Cromwell, supra*, that such a remedy requiring the aggrieved, over-taxed taxpayer to seek the taxation of others similarly situated is not adequate as a matter of law. This Court thus stated (p. 623):

> The equal protection clause of the Fourteenth Amendment protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class. The right is the right to equal treatment. * * * The constitutional requirement, however, is not satisfied, if a State does not itself remove the discrimination, but imposes on him against whom the discrimination has been directed the burden of seeking an upward revision of the taxes of other members of the class.

2. Even if *Burford* were properly raised here, we submit that abstention is appropriate only with respect to the injunctive relief sought and that abstention is not appropriate with respect to the petitioner's prayer for damages with respect to past implementation of discriminatory tax plans. Indeed, dismissal of the damages aspect of the case is in conflict with the recent decision of the Court of Appeals for the Seventh Circuit in *Sacks Brothers Loan Co., Inc. v. Cunningham, etc., et al.* (No. 77-1729, decided May 24, 1978). There a taxpayer complained of the taxation of its personal property while others similarly situated were not taxed. Invoking the same cause of action and jurisdiction statutes invoked here, the taxpayer sued for injunctive relief and for damages. The Court affirmed dismissal of the request for

injunctive relief after finding the state remedy adequate, but remanded the damages aspect for trial.

The petitioner here sought injunctive relief *and* damages. We cannot explain the court of appeals' failure to even recognize the request for damages or that different considerations of Federalism might apply to that request than the request for injunctive relief. In any event, the court of appeals' affirmance conflicts with the recent decision of the Seventh Circuit in *Sacks Brothers.*

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

GRAY-TAYLOR, INC., etc.,
Plaintiff-Appellant,

v.

HARRIS COUNTY, et al.,
Defendants-Appellees.

No. 77-2801

Summary Calendar*

United States Court of Appeals,
Fifth Circuit.

March 17, 1978.

Corporation brought action against county and county officials, claiming that the county property taxation scheme was unconstitutionally discriminatory. The United States District Court for the Southern District of Texas, Carl O. Bue, Jr., J., abstained and dismissed, and corporation appealed. The Court of Appeals held that where the district court had determined that there was pending in state court a suit by a different plaintiff against the same defendants seeking the same class action injunctive relief, the district court properly abstained to avoid a needless conflict between the federal courts and the State of Texas.

Affirmed.

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* Rule 18, 5 Cir.; see *Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al.*, 5 Cir., 1970, 431 F.2d 409, Part I.

Appeal from the United States District Court for the Southern District of Texas.

Before AINSWORTH, MORGAN and GEE, Circuit Judges.

PER CURIAM:

Gray-Taylor, Inc. sued Harris County, Texas, and various officials thereof, claiming that the property taxation scheme of the county is so discriminatory about what property is assessed as to violate not only the Constitution and laws of Texas but the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The complaint pleads a class action and seeks an injunction against the defendants' implementing the tax system.

The district court determined that there is pending in estate court a suit by a different plaintiff against the same defendants as in the case at bar and seeking the same class-action injunctive relief. The district court abstained from reaching the merits of the suit and dismissed the case. We conclude the district court properly abstained to avoid a needless conflict between the federal courts and the State of Texas in the administration of its internal affairs. *See, Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943). *See,* also, *Great Lakes Dredge and Dock Co. v. Huffman,* 319 U.S. 293, 300-301, 63 S.Ct. 1070, 87 L.Ed. 1407 (1943), (abstention proper in suit for declaratory judgment against a state taxation statute).

The judgment of the district court is AFFIRMED.

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 77-2801

GRAY-TAYLOR, INC., ETC.,
Plaintiff-Appellant,

v.

HARRIS COUNTY, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Texas

ON PETITION FOR REHEARING

(April 24, 1978)

Before AINSWORTH, MORGAN and GEE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

THOMAS GIBBS GEE
United States Circuit Judge

APPENDIX C

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-77-949

GRAY-TAYLOR, INC., d/b/a JIMMIE GREEN CHEVROLET, on its own behalf as a representative of a class of persons similarly situated,
Plaintiff,

v.

HARRIS COUNTY, ET AL,
Defendants.

ORDER OF DISMISSAL

Plaintiff has filed this action in federal court on behalf of himself and certain other Harris County property owners whose property is included on county tax rolls. Plaintiff contends that the taxing plan which defendants propose to adopt is illegal and unconstitutional in that the plan omits from the ad valorem tax rolls certain broad classes of non-business personal property which are required to be taxed by the Texas Constitution and by Texas statutory law.

Plaintiff seeks to enjoin the adoption and implementation of the allegedly illegal tax plan, requests a writ of mandamus to order implementation of a revised tax plan that will include the property in question and seeks damages for alleged overpayment of taxes in the past.

Defendants have responded with two contentions. Defendants first move the court to abstain from exercising jurisdiction over this case for reasons involving the doctrines of federalism and comity. Defendants also argue that the Tax Injunction Act, 28 U.S.C. § 1341, operates to place this cause without the confines of federal jurisdiction.

The United States Magistrate on July 21, 1977, filed his Memorandum and Recommendation in which he recommended that defendants' motion to abtain be granted. The Magistrate also ruled that § 1341 deprived the federal court of jurisdiction. Plaintiff has excepted to these rulings of the Magistrate.

The Court has carefully considered the pleadings, the briefs of counsel and the applicable law, and is of the opinion that for the reasons stated on pages 9-10 of the Magistrate's Memorandum, this is a proper case for federal abstention.

Having decided in favor of abstention, there is no need for the Court to rule on the issue of whether or not 28 U.S.C. § 1341 poses a barrier to federal jurisdiction in the instant case.[1]

---

1. Some conceptual difficulty in resolving this issue has been engendered, the Court believes, by the fact that plaintiff has sought various remedies that give differing results when tested against the statute (28 U.S.C. § 1341). *See* Plaintiff's Original Complaint at 8; Amended Complaint at 6, 10.

Plaintiff seeks to prevent the allegedly illegal plan from going into effect and also seeks to have a properly revised plan implemented. Any attempt to enjoin implementation of a tax plan must meet with failure by reason of § 1341. But where the suit instead seeks to require the collection of additional taxes over and above the amount called for by the existing tax plan, section 1341 does not operate as a jurisdictional bar to maintenance of the action. *Hargrave v. McKinney*, 413 F.2d 320, 326-27 (5th Cir. 1969).

Defendants' Motion to Abstain is granted, and the case is dismissed.

DONE at Houston, Texas, this 5th day of August, 1977.

/s/ CARL O. BUE, JR.
Carl O. Bue, Jr.
United States District Judge

This is not to say, however, that the court should then necessarily take jurisdiction of the case, for, as was noted in *Hargrave v. McKinney, supra,* "serious questions of federalism inhere". Nor does section 1341 then disappear from view. More likely, section 1341 remains as a factor to be weighed by the Court in deciding whether or not to exercise jurisdiction over the case.

The Fifth Circuit Court of Appeals appeared to be on the verge of adopting such a view in *Hargrave v. McKinney, supra* at 326 n. 12:

> "It is of the utmost import to note that Section 1341 may, in addition to its role as a jurisdictional statute, codify a principle of discretion in the exercise of jurisdiction."

And the Supreme Court in discussing the applicability of section 1341 in another case has recently said in *Tully v. Griffin,* ——— U.S.———, 97 S.Ct. 219, 50 L.Ed.2d 227 (1976):

> "A federal district court is under an equitable duty to refrain from interfering with a State's collection of its revenue except in cases where an asserted federal right might otherwise be lost. . . . This policy of restraint has long been reflected and confirmed in the congressional command of 28 U.S.C. § 1341. . . ." (cites omitted)

50 L.Ed.2d at 232.

This Court has thus taken into consideration in its decision to abstain the words of, and the case law surrounding, section 1341. Had the Court been required to rule upon whether the Texas courts provide a "plain, speedy, and efficient" remedy, the Court would have found that the taxpayer here does have an adequate remedy in the state courts.

APPENDIX D

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-77-949

Judge Carl O. Bue, Jr.

GRAY-TAYLOR, INC., dba JIMMIE GREEN CHEVROLET, ON ITS OWN BEHALF AND AS A REPRESENTATIVE OF A CLASS OF PERSONS SIMILARLY SITUATED,
Plaintiff

v.

HARRIS COUNTY, CARL S. SMITH, JON LINDSAY, THOMAS H. BASS, JIM FONTENO, ROBERT Y. ECKELS AND E. A. LYONS, JR.,
Defendants.

MAGISTRATE'S MEMORANDUM AND RECOMMENDATION:

Plaintiff has filed an Amended Complaint as a class action in behalf of persons owning property in Harris County, Texas, whose property will be included on the tax rolls of the county. Defendants are Harris County and the county taxing authorities. Plaintiff claims jurisdiction under 42 USC § 1983 and 28 USC § 1343(3), and venue under 28 USC § 1391(b). Plaintiff seeks actual and punitive damages, prohibitory and mandatory injunctions, mandamus, and costs including attorneys' fees.

Defendant Carl Smith, tax assessor and collector for Harris County, has filed Motion to Abstain and Response to Amended Complaint, and other Defendants, except Harris County, have filed Adoption of all pleadings, briefs and motions of Defendant Carl Smith.

It is recommended that the Motion to Abstain be granted and that the case be dismissed.

Contention of Plaintiff

Plaintiff seeks to enjoin Defendants from adopting an unconstitutional and illegal scheme of property taxation in Harris County and to compel Defendants by writ of mandamus to comply with constitutional and statutory mandate that all nonexempt property in the county be taxed equally and uniformly. Plaintiff contends that through selective assessment, valuation and enforcement, the tax plan for Harris County provides taxation primarily on real property and certain business personal property but omits and thus does not tax broad categories of non-business personal property, "such as jewelry, clothing, sports equipment, airplanes, corporate stock, household furniture in excess of the exempted amount, personal automobiles, cash, bank and savings deposits, accounts receivable, and the like". Plaintiff contends such discrimination in taxation violates the Constitution and statutes of Texas.

Contention of Defendants

Defendants contend that under the provisions of 28 USC § 1341, the United States District Court does not have jurisdiction in this matter. Defendants further contend that jurisdiction should be declined under the doctrines of abstention and comity.

Applicability of 28 USCA § 1341

28 USCA § 1341, the Tax Injunction Act, provides:

> "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

The key to application of 28 USCA § 1341 to this case is whether the Plaintiff as a taxpayer has a "plain, speedy and efficient remedy" in the courts of Texas and under the laws of Texas to attack the Defendants' plan of taxation. If such a remedy is available, the federal court has the duty to withhold relief and will not have jurisdiction. The Act will prevail over a civil rights claim under 28 USCA § 1983. *Bland v. McHann,* 463 F.2d 21 (5th Cir. 1972).

Remedies in Texas Courts

Article VIII, Section 1, of the Texas Constitution provides:

> "Taxation shall be equal and uniform. All property in this state, whether owned by natural persons or corporations, other than municipal, shall be taxed in proportion to its value, which shall be ascertained as may be provided by law.—"

Article 7145, V.A.T.S., provides:

> "All property, real, personal or mixed, except as may be hereinafter expressly exempted, is subject to taxation, and the same shall be rendered and listed as herein prescribed."

Article 7150, V.A.T.S., et seq., contain the exemptions from taxation. Under these constitutional and statutory provisions, plans of taxation are formulated by the various taxing agencies throughout Texas. The Texas Supreme Court has outlined the general rules for attacking tax valuations in *State v. Whittenburg,* 265 S.W.2d 569 (Tex. S.Ct., 1954) at pages 572, 573:

> "Since the Courts of this State, in common with the courts of other jurisdictions, early recognized that exact uniformity and equality of taxation was unattainable, Rosenberg v. Weeks, 67 Tex. 578, 4 S.W. 899, 901; Cooley on Taxation, 4th Edition, Vol. 1, ¶ 259, they have sought through the years to lay down certain rules by the which the force of an attack on assessed valuations, duly fixed by boards of equalization, may be measured.
>
> No attack on valuations fixed by boards of equalization 'can or will be sustained in the absence of proof of fraud, want of jurisdiction, illegality, or the adoption of an arbitrary and fundamentally erroneous plan or scheme of valuation.'—Moreover, when their official action is attacked it will be presumed that such boards discharged their duties as public agencies according to law and acted in good faith.—While it has been held that a grossly excessive valuation may, in law, be sufficient to establish such fraud or illequality as to render a valuation void,—it is held with equal emphasis that mere errors in judgment or the fact that a trial judge or jury differs with the valuation fixed will not suffice as a basis for avoiding the board's action.—If a valuation fixed by a board of equalization is attacked on the ground of unlawful or arbitrary discrimination it is not sufficient to show, comparatively, that in other isolated instances, property of equal or greater value than that in suit, was valued at

> less,—or even that other property was omitted from the tax rolls altogether, except where omission was the result of a deliberate and arbitrary plan or scheme to permit certain classes of property to escape their fair share of the tax burden.—To prevail on the basis of unlawful discrimination it is not necessary that the taxpayer make a comparative showing with all other property in the county—but he must make at least a reasonable showing in that respect.
>
> When the attack is made because the board followed an arbitrary plan or scheme of fixing values, the taxpayer, to prevail, must show not only that the plan was an arbitrary and illegal one but also that the use of the plan worked to his substantial injury." [Citations omitted]

Plaintiff here attacks the taxing plan of Harris County for omissions of property from the tax rolls. The Texas Supreme Court in *City of Arlington v. Cannon,* 271 S.W.2d 414 at page 416 stated:

> "The deliberate adoption of a plan for the omission from the tax rolls of a large volume of property, personal or real, is in direct contravention of constitutional and statutory provisions for equality and uniformity of taxation. Article VIII, Section 1, Constitution of Texas, Vernon's Ann. St., Article 7174, Vernon's Annotated Civil Statutes, 1925. Such a plan of taxation results in the rankest kind of discrimination between taxpayers. It does not lie with local taxing authorities to say that certain classes shall bear the entire burden of ad valorem taxation."

Whittenburg, supra, recognizes the right to relief from such arbitrary plan of taxation. As to the procedure, the Texas Supreme Court stated, *City of Arlington,* supra, at pages 416, 417:

> "However, if the taxpayer fails to avail himself of the remedies of mandamus and injunction to prevent a taxing authority from putting such plan into effect,—his right to relief is limited.—Once such a plan is put into effect the litigant may defeat the recovery of taxes only to the extent that they are excessive and he must assume the burden of proving excessiveness."

In *Whelan v. State*, 282 S.W.2d 378 (Tex. S.Ct. 1955), the lower courts had excluded evidence showing bank deposits had been omitted from the tax rolls. The Texas Supreme Court, at pages 382-83, held in reversing and remanding:

> "It is not for taxing authorities to decide what property shall escape taxation; that right lies alone with the people in the writing of their Constitution and with the Legislature in the enactment of laws. Neither may a taxpayer be denied his constitutional right to equal and uniform taxation because the omission to place property on the tax rolls is the omission of the tax assessor rather than of the Board of Equalization."

The court held the excluded evidence was admissible, saying, at page 384:

> "—the preferred evidence, if undisputed, would have shown substantial injury as a matter of law in that petitioner's taxes were excessive to the extent indicated.—If petitioners can show substantial injury on a retrial by reason of the omission of taxable bank deposits from the tax rolls they will be entitled to a judgment setting aside the assessment—and to a reassessment of their properties on an equal and uniform basis—"

While a tax plan may be arbitrary and discriminatory through omissions of property from the tax rolls, the taxing authority does not lose its rights to taxes justly owing on one parcel of property by reason of the failure of its officers, either negligently or designedly, to assess other property that is likewise taxable. *City of Wichita Falls v. J. J. & M. Taxman Refining Co., Inc.*, 74 S.W. 2d 524, 530 (Tex. Civ. App., Ft. Worth, 1934). *Sam Bassett Lumber Co. v. City of Houston*, 198 S.W.2d 879, 880 (Tex. S.Ct. 1947) states: "Thus the fact that other property in the city was not assessed for taxation presents no defense to the suit against the petitioner for taxes not shown to be within themselves excessive."

Granted that the Texas courts recognize the rights of taxpayers to attack arbitrary and illegal tax plans, the method of attack is critical. The preferred method, and possibly the only method likely to achieve success, is the "direct" method through seeking relief by injunction or by mandamus before tax rolls are finalized and the tax plan has been accepted and put into effect. If the plan is held invalid, the taxing authority may amend or implement the plan as necessary before assessments are made. In *City of Houston v. Baker*, 178 S.W. 820 (Tex. Civ. App., Galveston, 1915), taxpayer obtained an injunction against a proposed tax plan of the City of Houstion, before the plan went into effect, and the injunction was upheld on appeal. In a later case before the same court, *Sam Bassett Lumber Co. v. City of Houston*, 194 S.W.2d 114 (Tex. Civ. App., Galveston, 1946), where relief was sought after the tax plan was in effect, the court stated, at page 117:

> "And while the point is not before us, it would seem that, had appellant undertaken to have prevented

> such plan from being put in operation before the taxes were assessed, it could have been entitled to such remedy. In any case, the authority of the Baker case has never been questioned."

The "collateral" attack is made after the plan has gone into effect and assessments made. Collateral attack suits would be to enjoin or to defend against the collection of taxes or possibly to pay tax under protest and seek refund. Here the taxpayer must bear the substantial, if not impossible in fact, burden of proving that his taxes were excessive and that he suffered substantial injury. *City of Arlington v. Cannon*, supra; *State v. Federal Land Bank of Houston*, 329 S.W.2d 847 (Tex. S.Ct. 1959); *Blaha v. McHenry*, 468 S.W.2d 186 (Tex. Civ. App., Houston, 1971); *McPhaul v. City of Lubbock*, 401 S.W.2d 705 (Tex. Civ. App., Amarillo, 1966).

Since *City of Houston v. Baker*, supra, taxpayers have not been significantly successful in direct attack by mandamus and injunction before tax plans were adopted. In *Kelly v. A & M Consolidated Ind. School District*, 398 S.W.2d 438 (Tex. Civ. App., Waco, 1966), the taxpayer sought injunctive and mandamus relief where it was undisputed that bank deposits, automobiles, household furnishings and other items of personalty were omitted from the tax rolls. The court held that where valuation was attacked on the ground of discrimination, it was not sufficient to show that other property was omitted from the tax rolls "except where the omission was the result of a deliberate and arbitrary plan or scheme to permit certain classes of property to escape their fair share of the tax burden." (page 439) Issue was presented to the jury whether the omission was

"deliberate and intentional" and the jury answered that it was not. On appeal the taxpayer contended the omission was evidence of an arbitrary scheme, but the court found there was no evidence of any scheme. The court also refused mandamus after testimony as to efforts by the assessor to include some omitted or unrendered properties.

In *Swamp Irish Inc. v. Snow*, 501 S.W.2d 690 (Tex. Civ. App., Corpus Christi, 1973) the taxpayer sought mandamus and injunctive relief to compel the assessment and collection of taxes on omitted personal property, including bank deposits, stock and bonds and corporate assets. The court held that alleging and proving absence of certain taxable property was not sufficient, for the taxpayer must prove that the omission resulted in substantial injury in dollars and was the result of a deliberate, arbitrary and fundamentally erroneous scheme adopted and imposed by tax officials to permit excluded classes to escape their fair share of the tax burden. The court stated, at page 694:

> "While cash, stocks, bonds and moneys in banks and other financial institutions are taxable and should be placed on the tax assessment rolls, the burden resting upon tax officials to properly and correctly assess such properties is almost impossible from a practical standpoint. Art. 342-705 VACS. Some practical considerations must be given to such a problem, though an attempt must be made to include such classes of property in the tax program. In the case at bar such an attempt was made. The summary judgment proof reveals that a bona fide effort was made to include all classes of taxable property in the county tax rolls for the year 1970."

Texas Remedies and 28 USCA § 1341

If the federal court finds that a taxpayer has a "plain, speedy and efficient remedy" in the state courts of Texas, 28 USCA § 1341 will be applied to bar federal jurisdiction.

Prior to 28 USCA § 1341, the present Tax Injunction Act (1948), 28 USCA § 41(1) provided there was no federal jurisdiction where there was a plain, speedy and efficient remedy at law or in equity in the state courts. In *Norton v. Cass County,* 115 F.2d 884 (5th Cir. 1940), taxpayer sought to enjoin taxation of oil payments by a Texas county. The court found that in Texas the jurisdiction of the state courts to issue injunctions against collection of illegal taxes had been upheld, and whether or not the taxpayer had a plain, speedy and adequate remedy available at law in Texas, there was no doubt he had such a remedy in equity. The court held 28 USCA § 41(1) was applicable and dismissed the case. The "at law or in equity" words were omitted from 28 USCA § 1341.

In *City of Orange v. Levingston Shipbuilding Co.,* 258 F.2d 240 (5th Cir. 1958), the taxpayer sought to enjoin the collection of assessed taxes. One of the reasons for claiming the assessment void was that other personal property had been omitted from the tax rolls. The court reviewed *State v. Wittenburg,* supra, *City of Arlington v. Cannon,* supra, and *Whelan v. State,* supra, and pointed out the limited nature of relief available to the taxpayer if he fails to avail himself of mandamus and injunctive relief to prevent the taxing authority from putting an arbitrary plan into effect. The court recognized that substantial amounts of personal property had been omitted

from the rolls as a patent violation of Texas constitutional and statutory requirements. Taxpayer had a remedy in the Texas courts but failed to meet the onerous burden of having adequate proof of the actual or taxable value of omitted properties, or proving that his tax would have been less if taxed with others within the omitted classifications. The court stated, at page 248:

> "It is merely an application of the approach consistently laid down that no matter how illegal the assessment, no matter how much it violates the State Constitutional pattern, the only relief of a taxpayer defending delinquent tax suit is to show in dollars that he is worse off."

The question whether Texas remedies were "plain, speedy and efficient" was again raised in *City of Houston v. Standard Triumph Motor Co.,* 347 F.2d 194 (5th Cir. 1965). The court stated, at page 199:

> "The answer is simple. Texas has a vast arsenal to assure orderly adjudication of the serious federal constitutional question here presented."

The Court recognized that Texas has a Declaratory Judgment Act: Article 2524-1 V.A.T.S.; that taxpayers have the right to injunctive relief from illegal tax assessments; that taxpayers have the right to recover illegally collected taxes and possibly protest illegal taxes with or without payment; and that taxpayers have defense against collection of illegal taxes. The court stated that whatever shortcomings may be urged and burdens encountered in defending a suit for collection of delinquent taxes or suit for refund of taxes paid under protest (the collateral attack), the court, since *Norton v. Cass County,* supra,

has recognized that the remedy by injunction in the courts of Texas (the direct attack) is plain, speedy, efficient and complete. Declaratory judgment was sought in *Standard-Triumph,* but the court held the policies proscribing injunctive relief under 28 USCA § 1341 applied equally to declaratory relief and dismissed the case. The court stated, at page 200:

> "Nothing the Federal Court can grant by way of declaratory judgment or otherwise affords to this Importer [taxpayer] a single right which it may not assert with confidence in the Courts of Texas."

U. S. District Courts in Texas have also found Texas remedies to be plain, speedy and efficient. *Hammon v. City of Corpus Christi,* 226 F.Supp. 456 (S.D. Tex. 1964); *Flato Realty Investments v. City of Big Spring,* 388 F.Supp. 131 (N.D. Tx. 1975); *Alnoa G. Corporation v. City of Houston,* C.A. H-77-218, S.D. Texas, Judge Carl O. Bue, Jr.

Plaintiff has asked that the federal courts analyze in depth the adequacy of the Texas remedy in applying the Tax Injunction Act. As noted by Plaintiff, the Fifth Circuit analyzed § 1341 in depth in *Tramel v. Schrader,* 505 F.2d 1310 (5th Cir. 1975). The court, however, stated flatly, at page 1314, "Remedies in the Texas state courts are adequate." The court referred to *Hargrave v. McKinney,* 413 F.2d 320 (5th Cir. 1969) for discussion of the purposes of the Act and the congressional intent for broad application.

Plaintiff Denial of Effective State Remedy

Plaintiff refers to the discussions contained in Yudof, *The Property Tax in Texas Under State and Federal Law,*

51 Tex. L. Rev. 885 (1973), and Plaintiff concludes that the courts in Texas have only paid "lip service" to the availability of remedies in Texas and that such remedy is available in theory and not in practice. It does appear that the burden on a taxpayer for collateral attack after assessment of tax is so onerous that the remedy may in fact be inadequate. *City of Orange v. Levingston Shipbuilding Co.,* supra. As to direct attack by mandamus or injunction, however, the Texas courts have held that a remedy is available and the federal courts have found the remedy "plain, speedy and efficient." The Fifth Circuit stated in *Bland v. McHann,* supra, at page 29:

> "Neither the judicial decisions nor § 1341 requires that the state remedy be the best remedy available or even equal to or better than the remedy which might be available in the federal courts. Section 1341 merely requires that the state remedy be 'plain, speedy and efficient.' "

There is no requirement in 28 USC § 1341 that the remedy in state court be *successful* for the taxpayer. The Texas courts held for the taxpayer in *Whelan* and *Baker,* supra. In both *Kelly* and *Swamp Irish,* supra, the taxpayers lost on direct attack, but the decisions were based on evidence and proof. The remedy was available, but taxpayers failed in their presentation of the cases.

Abstention and Comity

Suit has been brought in the 164th District Court of Harris County, Texas, Civil Action No. 113,163, captioned *T. G. Motors, Inc. of Houston, dba Tom Gray Datsun v. Carl S. Smith, et al.* The state court suit is also a class action, alleges virtually the same claims and seeks

virtually the same relief as in this federal suit. There is indication that the plaintiffs in the two suits are affiliated, either as automobile dealers in Harris County, or in actual corporate connections, but certainly as members of the class of Harris County taxpayers seeking relief. State court plaintiff has been denied a temporary restraining order and is currently seeking a temporary injunction, and if granted will seek leave to take certain depositions. It is noted that the state court plaintiff, like the federal court plaintiff, is making a direct attack by mandamus and injunction before the tax plan is put into effect. Abstention was upheld in *Harris County Commissioners Court v. Moore,* 420 U.S. 77 (1974) where the U. S. Supreme Court stated, at page 83:

> "Where there is an action pending in state court that will likely resolve the state law questions underlying the federal claim, we have regularly ordered abstention."

The Supreme Court also noted, page 85, footnote 8:

> "But where the challenged statute is part of an integrated scheme of related constitutional provisions, statutes and regulations, and where the scheme as a whole calls for clarifying interpretation by the state courts, we have regularly required the district courts to abstain. See Reetz v. Buzanich, 397 U.S. 82 (1970); Meridian v. Southern Bell Tel. & Tel. Co., 358 U.S. 639 (1959)."

The Fifth Circuit in *Bland v. McHann,* supra, at page 24, stated:

> "We are convinced that both longstanding judicial policy and congressional restriction of federal juris-

> diction in cases involving state tax administration make it the duty of federal courts to withhold relief when a state legislature has provided an adequate scheme whereby a taxpayer may maintain a suit to challenge a state tax. The taxpayer may assert his federal rights in the state courts and secure a review by the Supreme Court."

In the *Yusof* [sic - *Yudof*] article, supra, the author commented that the courts of Texas have been hesitant to grant relief in the Texas property tax structure since assessment inequality appeared to be well entrenched in Texas, and any such relief would affect virtually every taxing jurisdiction in Texas. Since the controversy here goes to the very Constitution of Texas and the statutes thereunder, the judicial application of the constitutional provisions should properly be by the courts of Texas. If not resolved, the ultimate determination as to the state tax structure and its application should be made by the legislature and citizens of Texas.

Conclusion

The federal courts have held consistently since *Norton v. Cass County, supra,* that Texas state remedies are adequate for application of 28 USCA § 1341 to suits brought in federal district court for relief from Texas taxes. 28 USCA § 1341 is thus applicable to the complaint in this case and to the injunctive and mandamus relief sought as well as to the ancillary claim for damages. Acordingly, it is recommended that the motion to abstain be granted and that the case be dismissed.

The Clerk is to file this Memorandum and Recommendation and send copies to the District Court, plaintiff and defendants.

DONE at Houston, Texas, this 20th day of July, 1977.

Signature Illegible
United States Magistrate

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 77-2801

Summary Calendar

D. C. Docket No. CA-77-H-949

GRAY-TAYLOR, INC., ETC.,
Plaintiff-Appellant,

v.

HARRIS COUNTY, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas

Before AINSWORTH, MORGAN and GEE, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18 ;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiff-appellant pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

March 17, 1978

ISSUED AS MANDATE: May 2, 1978

APPENDIX F

CONSTITUTION OF UNITED STATES OF AMERICA

AMENDMENT XIV.—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

28 U.S.C.

§ 1341. Taxes by States

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

* * *

§ 1343. Civil rights and elective franchise

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured

by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

* * *

42 U.S.C.

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

* * *

TEXAS CONSTITUTION

ARTICLE VIII

TAXATION AND REVENUE

§ 1. Equality and uniformity; tax in proportion to value; polltax; occupation taxes; income tax; exemption of household furniture.

Section 1. Taxation shall be equal and uniform. All property in this State, whether owned by natural persons or corporations, other than municipal, shall be taxed in proportion to its value, which shall be ascertained as may be provided by law. The Legislature may impose a poll tax. It may also impose occupation taxes, both upon natural persons and upon

corporations, other than municipal, doing any business in this State. It may also tax incomes of both natural persons and corporations other than municipal, except that persons engaged in mechanical and agricultural pursuits shall never be required to pay an occupation tax; Provided, that two hundred and fifty dollars worth of household and kitchen furniture, belonging to each family in this State shall be exempt from taxation, and provided further that the occupation tax levied by any county, city or town for any year on persons or corporations pursuing any profession or business, shall not exceed one-half of the tax levied by the State for the same period on such profession or business.

* * *

TEXAS STATUTES (Tex. Rev. Civ. Stat. Ann.)

Article 7145. [7503] [5061] All property taxed

All property, real, personal or mixed, except such as may be hereinafter expressly exempted, is subject to taxation, and the same shall be rendered and listed as herein prescribed. Acts 1876 p. 275; G.L. vol. 8 p. 1111.

APPENDIX G

House Study Group Texas House of Representatives
Room 315-C, Capitol Building, Austin, Texas 78769

Rep. John Bryant, Chairman (512) 475-6011

HOUSE STUDY GROUP
SPECIAL LEGISLATIVE REPORT

January 23, 1978

INTANGIBLES AND THE PROPERTY TAX

> "All property in this state . . . shall be taxed in proportion to its value."—Article VIII, Texas Constitution
>
> "Personal property, for the purposes of taxation, shall be construed to include . . . all moneys, credits, bonds, and other evidences of debt owned by citizens of this State."—Article 7147, Texas Statutes

A pending federal court decision may require Texas to change its long-standing policy of failing to put intangible assets on the property tax rolls. This report examines why most intangibles are not taxed in Texas, and why some economists think they shouldn't be taxed. It also looks at how other states treat intangibles and at the arguments in favor of taxing them. Finally it considers several specific approaches Texas could choose.

This report takes its information and arguments from a variety of sources including economics journals and textbooks, state and federal government reports, and studies by lawyers, political scientists, and legislators. A list of the major sources appears at the end of the report.

/s/ JOHN BRYANT
John Bryant, Chairman

Intangible personal property is any paper evidence of wealth. It includes money, bank deposits, stocks, bonds, annuities, pensions, mortgages, franchises, patent rights, and other similar types of assets. The Texas Constitution clearly indicates that intangibles are subject to the general property tax. However, almost no intangible property is actually on the tax rolls.

This situation may change drastically in the near future. U. S. District Judge Jack Roberts of Austin is now hearing a lawsuit (*Wilson v. Brockette*) challenging the constitutionality of the state's school finance system. The plaintiffs, rural school districts, charge that the system discriminates against them. They say that rural areas have most of their wealth in real property, almost all of which is on the tax rolls. Residents of urban and suburban districts, however, hold much of their wealth in intangible property that is not taxed. So, the plaintiffs conclude, urban and suburban districts seem to be poorer than they really are, and as a result receive more state education aid than they should be entitled to.

Last summer Judge Roberts denied a request for a preliminary injunction, but his opinion indicated that the plaintiffs are likely to win when the case is tried. He stated that "this system of distributing state funds to support public education violates the federal Equal Protection Clause." He also found that the system violates the State Constitution.

The case will probably be decided next spring. The judge could rule that intangibles must be made subject to property taxation, or that the state must find some new basis for calculating aid to local school districts. In any event, taxation of intangibles is likely to become an important public issue.

Property is commonly divided into three categories. *Real property* includes land and buildings, mineral rights, and other wealth linked closely to the land. *Tangible personal property* includes machinery, tools, business inventories, motor vehicles, home furnishings, crops, and most other movable objects. *Intangible personal property* usually refers to any evidence of wealth that is recorded on paper (or, these days, on computer tapes) such as money, securities, and bank deposits.

When the property tax was introduced, real property was the most important type because most assets consisted of land or buildings. Since the location of real property is fixed it is usually easy to find it and put it on the tax rolls. These two factors account for the fact that most wealth on the tax rolls is real property. However, real property now constitutes less than half of all wealth. This is largely due to the growth of corporations and financial institutions and the resulting proliferation of stock, bonds, and other intangible assets.

All personal property (except $250 in household furnishings per family) is theoretically subject to the Texas property tax. However, assessors in Texas and most other states make only a limited effort to put personal property on the tax rolls. Nationwide, about 15% of all wealth is tangible personal property. Most of this, mainly motor vehicles and business inventories, winds up on the tax rolls. But virtually no intangible personal property is on the ad valorem tax rolls. Although intangibles are thought to represent almost half of the wealth in Texas, they make up only about 2% of all property that is now taxed. The exclusion of intangibles from the tax base is a major factor in the increasing burden the real property tax is putting on Texas residents.

POTENTIAL IMPACT OF INTANGIBLES TAXATION

Estimates of the total value of intangibles in Texas vary greatly. A research project by the University of Texas—Arlington Institute of Urban Studies used several different estimating methods and came up with values of from $125 to $220 billion. A different study produced a figure of $75 billion. By comparison, the Governor's Office of Education Resources study calculated that the market value of all property *now* on the tax rolls is about $235 billion. If all intangibles were put on the tax rolls and taxed equally with real property, tax rates on real property could be reduced by 25 to 45 percent. Although taxes on intangibles are very unlikely to have such a great impact in practice, intangibles could certainly become an extremely important source of revenue.

Taxation of intangibles would make the property tax much less "regressive" since most intangibles are owned by wealthy individuals. (A "regressive" tax is one that makes people with lower incomes pay a larger percentage of their income than higher-income people must pay.) One study found that the richest 1% of the U. S. population own 77% of all corporate stock and bonds and over 90% of state and local government bonds, but only 12.5% of all real property. (Some intangibles, such as pension equities, bank deposits, and insurance reserves are much more evenly distributed.) Another study reported the percentage that intangibles constitute of the wealth of different groups in the nation:

Individual wealth	Intangible assets as a percentage of the individual's total wealth
0 to $15,000	42%
$15,000 to $30,000	30
$30,000 to $60,000	50
$60,000 to $100,000	69
$100,000 to $200,000	68
$200,000 to $500,000	89
$500,000 to $1,000,000	83
Over $1,000,000	92

Well-to-do and rich individuals have most of their assets in intangibles that now escape property taxation. By contrast, a much lower percentage of the wealth of poor and middle-income people is in the form of intangibles. Most of their very limited wealth is their equity in their homes. (The poorest people of course own little wealth at all, either real or intangible.) Poor and middle-income people now pay real property taxes on their homes either directly or as a part of their rent. They would therefore benefit greatly if taxation of intangibles lowers the real property tax rate.

One interesting result of taxing intangibles would be a reduction in the total amount of federal income taxes paid by Texas residents. State and local property taxes are deductible on taxpayers' federal income tax returns. The amount saved on the federal tax depends on the income of the taxpayers involved. Higher income people are in higher tax brackets, so any new deduction saves them more in income taxes than the same deduction would save lower income taxpayers. Most intangibles are owned by people who have high incomes. Shifting some of the property tax burden onto intangibles would require these

people to pay more property taxes, and would therefore reduce their federal income tax payments. (The savings on their income taxes would counteract only part of the increased property taxes they would have to pay on their intangible assets. Their combined tax bill would rise.) The total amount of the federal tax savings would be greater than it was when only real property owners shared the property tax burden. The appendix to this report contains an example showing how this would work.

PROBLEMS WITH TAXATION OF INTANGIBLES

If adding intangibles to the tax base would have such a beneficial impact on local finances, if it would make the property tax less regressive, and if it is required by the Constitution, why wasn't it done long ago? There are a variety of reasons, including theoretical, administrative, and political ones.

Theoretical Objections

Theoretical objections to a tax on intangibles are based on several different lines of reasoning. The following are the most common arguments:

—Taxation of intangibles is "double taxation" of the same wealth.

—The tax would put an undue burden on investments.

—The tax is unfair because intangibles do not benefit from the services provided by the property tax.

—The tax is unfair to pensioners and others who live modestly on fixed income from intangible assets.

The "double taxation" argument relies on the idea that intangibles are not wealth but merely claims on real wealth. For example, if a building owned by a corporation is subject to the property tax it would be unfair to tax the building again by putting the corporation's stock and bonds on the tax rolls. Corporations would be taxed more heavily than unincorporated businesses and mortgaged property would be taxed twice (a tax on the property and a tax on the deed of trust) while unmortgaged property would be taxed only once.

The rebuttal to this argument is that in reality only a small portion of the value of intangibles actually "represents" assets that are already subject to the property tax. This is because most of the value of a business is not its real property but the talents of its workers and managers; its reputation, contracts, and goodwill; the patents, franchises, and other untaxed assets it owns; and the expectations investors have of the profits it will produce. In addition, corporations may own property in other states or countries where there is little or no property taxation. Further, if state and local government bonds "represent" property at all, they represent property that is exempt from the property tax. Studies of both Texas and the entire nation have estimated that only 15 to 25% of intangible wealth actually represents property that is now on the tax rolls. The rest of the value now escapes ad valorem taxation.

One compromise approach to the double taxation argument would exempt mortgages (deeds of trust) and perhaps other intangibles that also clearly represent already-taxed real property. But some advocates of taxing intangibles would reject even this approach. They

argue that double taxation is a common, and not necessarily undesirable part of our tax system. Personal income is taxed by the federal government and then much of the same money is taxed again under the state sales tax. Corporate income is taxed and then dividends are taxed. In addition, it can be argued that our economic system is based on the "creation" of new wealth from existing wealth. For example, if a person opens a bank account the bank might loan the depositor's money to a corporation that needed to build a new factory. Both the individual's bank account and the company's new factory would be actual wealth. There is little reason why one should be taxed while the other should not be. As a result, supporters of intangibles taxation suggests that the "double taxation" argument is without any merit.

The second theoretical objection to taking intangibles is that it would put too great a burden on investments. For example, the effective property tax rate in Dallas was 2.2% in 1970. The owner of a corporate bond might be receiving a return of 8% of the bond's market value. If the property tax were applied to the bond at an effective rate of 2.2% the tax would take up over a fourth of the return on the investment. This would be so great a burden that it might cause investors to evade the tax by legal or illegal means or even to leave the state.

There are a number of rebuttals to this argument. The first is that if intangibles are taxed the tax base should expand enough to substantially reduce the tax rate. A more fundamental rebuttal considers who pays the property tax now. If tax rates are so high that intangibles taxation would put an impossible burden on investors, the current situation is clearly much worse. Real prop-

erty owners (and tenants who pay for the tax through their rent) now pay the entire tax bill. And in many cases they do not even have the advantage of owning property that provides current income that can be used to pay the tax. Taxation of intangibles could spread the burden and shift much of it to richer individuals whose higher current income would make it easier for them to afford the tax. A compromise approach suggests that intangibles should be taxed, but at a lower rate than the one applied to real property.

Another theoretical reason to oppose taxation of intangibles is that such a tax violates the principle that tax revenues should be used to benefit the sources of the tax. This argument says that since intangibles do not benefit from public services they should not be taxed to provide the services.

Supporters of intangibles taxation hold that this "principle" is seldom observed. Neither the sales tax nor the progressive income tax was designed with it in mind. And even the property tax violates the principle because it funds schools, health care, and other services that benefit people rather than property. As one author wrote, "property cannot enjoy benefits in any real sense—only people benefit. And persons who hold intangibles benefit just as much from ordered society as anyone else does."

The final theoretical argument against taxation of intangibles is that it would be very harmful to pensioners and others who live modestly on fixed income from intangible assets. The prospect of taxing widows and orphans into poverty is not a very appealing one for advocates of intangibles taxation to contemplate. A variation on this argument is that intangibles taxation is regressive with respect to the least wealthy individuals in society. As the chart on page 2 indicates, the least wealthy people hold a fairly large percentage of their wealth in intangible assets. This is because these individuals own little or no real property, so intangibles make up a large percentage of their assets. They have few intangible assets, but these intangibles are all they do have. A tax on intangibles might hit them hard.

Those who support taxation of intangibles suggest that the solution to this problem would be to exempt from taxation a certain amount of intangible property owned by each person. This would be similar to the homestead exemption that is deducted from the value of real property. An exemption of the first several thousand dollars of intangible property would minimize the impact of intangibles taxation on the poor. Since most intangibles are owned by wealthy individuals, this exemption would cause a relatively small reduction in the amount of intangibles added to the tax rolls. If necessary, a higher tax rate could be applied to the remaining intangibles to compensate for the exemption.

There is an additional rebuttal to the argument that taxation of intangibles would harm the poor. As noted on page 2, poor people now pay real property taxes on their homes, either directly or as part of their rent. The savings on these taxes due to a reduction in the real property tax rate would more than make up for the new tax on intangibles in most cases.

Administrative Problems

People who oppose taxing intangible assets argue that even if we should tax them, we are in fact unable to. They point to a number of administrative difficulties:

—Problems with locating and assessing intangibles.

—The likelihood of investors moving their intangible assets to avoid taxation.

—Problems due to local administration of the property tax.

—Problems caused by multi-level ownership of the same underlying assets.

A study of intangibles taxation by the Texas Research League concluded that "discovery poses a virtually insurmountable problem."

Money and other intangible wealth can be hidden in mattresses, put in secret Swiss bank accounts, held by dummy corporations located outside the tax district, or kept out of the tax assessor's reach by many other methods both legal and illegal. The result would be discrimination against any property owners who were unable or unwilling to conceal their wealth. The revenue potential of intangibles taxation would also be drastically reduced because of these problems.

However, recent changes in federal tax policy have affected this situation so greatly that one writer now says that "to oppose an intangibles tax on the grounds that the holders of intangibles cannot be discovered is now a mistake of fact." This is because federal law now requires that every payment of over $10 in interest, dividends, or other income from intangibles must be reported to the Internal Revenue Service by the organization that makes the payment. Since the yield on investments is very roughly proportional to the value of the intangible assets, a tax on the yield could be used as a substitute for an ad valorem property tax on intangibles. Under this approach discovery is no longer such a serious problem since the IRS has the needed information and can share it with the state government. At least four states which tax intangibles receive extensive information from the IRS about income from intangible assets owned by state residents.

The second administrative problem with taxing intangibles is that the owner may be able to move the assets around to avoid the tax. In Chicago intangibles are taxed every year according to their value on April 1. Each year at the end of March investors move hundreds of millions of dollars from taxable assets into tax-exempt U.S. bonds or out-of-state bank deposits. In addition to reducing the revenue from the tax, this problem creates serious cash shortages in local banks whose customers begin mass withdrawals each March.

One way to deal with this problem would be to assess intangibles at their average value on several days each year. This would complicate the bookkeeping, however, and would not prevent all evasion. If the tax on intangibles were based on the annual yield of the assets this problem would be eliminated, since the location of the assets at any particular moment would have no effect on the tax owed. Both the investor and the tax collector would want the investment yield to be as large as possible.

Even if the temporary shifts could be avoided a tax on intangibles could have a permanent impact on investment decisions. Investors might be tempted to move their investments into federal government securities, which federal law exempts from any state intangibles tax. If state and local government bonds were subject to the tax they would be less attractive to investors. These bonds might

have to pay higher interest rates as a result. (However, the fact that income from them is not subject to the federal income tax would help mitigate this problem.) On the other hand, investment in real property might become more desirable as real property tax rates fell. The impact of these changes on the state's economy would be hard to predict, but might be quite dramatic.

Over a longer period other changes are possible. Lower taxes on real property could stimulate a building boom. The lower taxes on agricultural land could have a strong effect on the state's farmers and ranchers. Initially, the lower taxes could improve the profitability of agriculture by reducing costs. But eventually the lower taxes might make rural land more attractive for purchase by both farmers and speculators. This could boost land values so much that taxes would rise to their original levels. Not only would this wipe out the beneficial effect of lower taxes, but the higher land values might induce some farmers to sell their land for development. Of course, farmers who wanted to sell all along would welcome the higher land values.

Still other effects could occur. The taxes on intangibles could induce wealthy individuals to leave the state or to find ways to establish residence in other states or in rural Texas tax districts with low tax rates. The tax might discourage business and individuals from moving to Texas. However, the lack of corporate or personal income taxes in Texas would help mitigate these problems.

There is little concrete information on how large a shift in economic activity the taxation of intangibles would cause. However, a University of Texas-Arlington study of several other states concluded that "a low tax

rate on most intangibles will not cause major dislocation of financial assets or industry."

Some of the difficulties mentioned above could be avoided if the intangibles tax were based on the yield from investment income. The use of annual yield would prevent most evasion problems since the location of the assets would no longer matter. The problem of permanent shifts of money into non-taxed assets would still remain, however.

Another administrative difficulty results from the local nature of the property tax. If intangibles are to be put on the local tax rolls local assessors must be able to find them. Currently the local assessors have no way to find intangible property. The state would be able to locate most intangibles through its information-sharing agreement with the Internal Revenue Service. But the terms of this agreement would probably not permit wholesale distribution of confidential federal tax information to hundreds of local assessors.

One way to deal with this problem would be to have the state gather information on ownership of intangibles and then levy a direct tax on their yield. The revenue could be distributed to local governments. Alternatively, the state could assemble information from the IRS and other sources about the ownership of intangibles by each individual in the state. Each local assessor would then be told the value of intangibles owned by each resident of his or her tax district. The intangible assets would then be made subject to the regular ad valorem tax. These and other possibilities are discussed in the last section of this report.

The final administrative problem arises when assets are controlled through several layers of ownership. Suppose several individuals own all the stock in Conglomerate A, which owns all the stock of Corporation B, which in turn owns all of Company C. If intangibles taxation applies to both corporate and individual owners of wealth, double or even triple taxation of the same assets could result. (This differs from the "double taxation" argument discussed above because in this case *all* of the value of the corporate-owned stock would be taxed two or more times.) In the example cited above the value of Company C would be taxed three times since its value would be included in the value of the stock of both Corporation B and Conglomerate A.

This problem could be avoided if the tax is applied only to intangibles owned by individuals. Under such a scheme all of Conglomerate A's stock would be taxed since all of it was owned by individuals. But none of Corporation's B stock or Company's C's stock would be taxed since it was all held by an intermediary company.

Political Aspects

Enforcement of the constitutional provision requiring taxation of intangibles would affect many different groups of Texans in different ways. Groups who would be hurt by the taxation of intangibles are sure to oppose it. This section considers how a number of groups might be affected.

Real property owners are likely to benefit if a great deal of intangible property is taxed. The more intangible wealth on the tax rolls, the lower the burden on real property.

Intangible property owners obviously have the most to lose from taxation of intangibles. And since most rich individuals have most of their wealth in intangible assets, many rich and powerful people are likely to oppose a tax on intangibles.

Residents of rural areas would probably gain from an intangibles tax. This is because, as discussed above, most wealth in rural areas is in real property now subject to the property tax. As a result rural areas receive less state education aid than they would if intangible wealth were considered.

However, enforcement of the property tax on intangibles might prompt renewed efforts to tax all *real* property. Many studies have shown that farm and ranch land is generally underassessed compared to the values put on urban and suburban real estate. Urban legislators might insist on equal taxation of agricultural property as a condition for agreeing to taxation of intangibles. The effect of both of these changes on the distribution of school aid funds is hard to predict.

Finally, local tax assessors may oppose intangibles taxation on the grounds that it would cause more work and more state interference in their work.

INTANGIBLES TAXATION IN TEXAS

The Texas Constitution and state statutes make it clear that intangible assets are supposed to be put on the tax rolls. The Constitution says that all property should be taxed according to its value, and statutes include money, stock, bonds, and other intangibles in the definition of property. The state Supreme Court has recognized taxation of intangibles on several occasions. For example,

it held that "we full well realize the practical difficulties and problems to be encountered in taxing bank deposits, but to hold that they are not taxable would require us to fly in the very face of the Constitution and the Statutes of this state." *Whelan v. State,* 282 S.W.2d 378 (Tex. 1955).

In this and other cases courts have thrown out taxing schemes that ignore intangibles. However, none of the decisions has included a requirement that the state or a local tax district revamp its tax system to include intangibles. The result has been that intangibles theoretically must be taxed but in practice can be overlooked. Only 2% of the assessed property in the state is intangibles, although as much as half of all wealth in the state is intangible property. Almost all of the 2% consists of bank stock and intangibles owned by utilities, both of which are made subject to taxation by separate statutes.

Articles 7165 and 7166 of VACS require local assessors to list bank stock on local tax rolls. Banks must give local assessors a list of all of their stockholders, and may not pay dividends to stockholders who are in default on their taxes. Most banks actually pay the taxes on their stock directly to the local tax assessors. Although the taxes are theoretically owed by the stockholders, it is easier for the banks to pay the taxes out of their profits than it would be for them to list all their stockholders for the assessors and then keep track of any delinquent taxes. One interesting feature of this law is that it allows the banks to deduct the assessed value of their real property from the value of their total assets. This avoids any double taxation of the real property. Even with this deduction, this tax yielded $26 million in 1969.

Articles 7098 through 7116 of VACS set up a State Intangibles Tax Board with the authority to tax the assets of some transportation utility companies in the state. The Board is composed of the Comptroller, the Secretary of State, and the State Treasurer. Its work is done by the Intangible Tax Section of the Comptroller's Ad Valorem Tax Division. The Board assesses intangible assets of railroads, pipeline companies, and certain other transportation utilities.

The value of the intangibles is calculated indirectly. First, the company's annual income is capitalized to determine its total value. Then the value of its physical assets (land, buildings, machinery, etc.) is deducted. The remainder is the value of the company's intangibles. This amount is prorated according to the number of miles of system the company has in each tax district. The Board tells each local assessor how much property to put on the local tax rolls. The local assessor is responsible for levying and collecting the tax.

INTANGIBLES TAXATION IN OTHER STATES

State governments have generally chosen one of four different schemes for taxation of intangible property: treating intangibles the same as all other property, exempting them from taxation altogether, creating a special ad valorem tax system for intangibles, and taxing the yield (income) from intangibles.

Thirteen states claim to treat intangibles as part of the general property tax base. But one study says that "there is no evidence to indicate that intangible property is generally included on the tax rolls and taxed at the nominal general property tax rate" in any of these states.

The states that claim to tax intangibles equally with other property actually do not tax them at all in most cases. Texas is a member of this group of states.

Seventeen states have taken the step of formally excluding intangibles from taxation. The trend is in this direction, with eight states having repealed their tax on intangibles since 1966. This of course eliminates all of the current legal and administrative problems. However, it fails to utilize an extremely large potential source of tax revenues.

Thirteen states tax intangibles as a separate ad valorem tax system, usually at special, low rates. For example Florida taxes different types of intangibles at rates ranging from 1/10 mill to 2 mills. Even at these low rates the tax provides 4% of all state tax revenues. Kentucky has derived as much as 9% of state tax revenues from a 2.5 mill intangible tax. The rates used in other states range from 1/100 mill to 10 mills. (The impact of these rates is as follows: the owner of $1000 of intangibles would pay an annual tax of one cent if the tax rate was 1/100 mills. At 2 mills the tax would be two dollars, and at 10 mills the tax would be ten dollars.)

To enforce this type of law, states require corporations, banks, and securities dealers to inform the state tax agency of all intangible assets owned by state residents. Most states also require individuals to report the intangibles they own to state or local tax assessors.

Nine states levy a tax on the yield from intangibles.* For example, New Hampshire taxes income from in-

* The sum of the number of states using each method adds up to 52 because two states use both a yield tax and a special ad valorem tax.

tangibles at a rate of 4¼%. This tax produces almost 5% of all state tax revenues. Other states tax the yield at rates ranging from 2% to 9%.

It is possible to compare these yield taxes to ad valorem tax rates. If an investment yields a return of 8%, a yield tax of 2% would be equivalent to an effective property tax rate of 0.16%, or 1.6 mills. A 9% yield tax on an investment earning 8% would be the same as an effective property tax rate of 0.72%, or 7.2 mills. By comparison, the effective real property tax today in Texas averages about 1.2%, or 12 mills.

States using special taxation schemes (either special ad valorem taxes or yield taxes) have developed a number of different rules for taxing different kinds of assets. Some states apply lower rates to mortgages than to other intangibles because of the double taxation problem discussed above. Two states tax income-producing investments on a yield basis but levy a low ad valorem tax on unproductive investments. Several states give lower tax rates to credit unions, stock of corporations located within the state, and assets used by businesses. Some states with a yield tax apply it only to dividends and interest from investments, while others apply the tax to capital gains as well.

A number of different arrangements are used to administer intangibles taxes. These range from centralized assessment and collection done by a state agency to reliance on local assessors to find and tax intangibles. Most states use systems where a state agency at least helps to locate intangibles.

Kentucky uses a combined state/local system. All owners of intangibles must file an annual report with the

County Tax Commission listing the intangibles owned and stating their value. The Tax Commission then taxes the intangibles at special rates and collects the taxes along with the regular property tax.

To prevent evasion, the State Department of Revenue collects information about intangibles ownership. All banks, corporations, life insurance companies, and stockbrokers in the state must report to the Department the intangibles owned by state residents. Internal Revenue Service information is used to check the data and to find out about ownership of out-of-state intangible assets. The Department then forwards this information to the County Tax Commissions.

The state of North Carolina uses a more centralized approach. The state's Department of Revenue receives reports from corporations, banks and other institutions on the amount of intangibles owned by state residents. All owners of intangibles must file an annual return with the Department and must pay any tax that is due. The Department compares returns with the information received from corporations and banks to prevent any tax evasion. The Department collects all the funds, which it then distributes among counties and municipalities. The total cost of administration is about 2.5% of the revenues that are collected.

In Texas, administration of an expanded intangibles tax could be carried out by the existing State Intangibles Tax Board. Legislation would be needed to require corporations, banks, and other "issuers" of intangibles to report to the Board on intangibles owned by state residents. The Board would make arrangements with the Internal Revenue Service to use IRS information to check

on the accuracy of individuals' tax returns. The assessment rolls could be maintained either at the state or local level once the Intangibles Board had located the assets. Levying and collecting the taxes could also be done at either level.

Several states have overcome the traditional obstacles to taxing intangibles and have realized substantial tax revenues from them. While these states still tax intangibles at a lower effective rate than they apply to real property, these programs do help ease the burden on real property.

ALTERNATIVE APPROACHES FOR TEXAS

The current Texas policy towards intangibles is in open violation of the State Constitution and state laws. It is a standing invitation to lawsuits, and it allows a huge source of potential revenue to escape taxation. There are four main alternatives to the current situation:

1. Exempt intangibles from taxation.
2. Take steps to apply the regular ad valorem property tax to intangibles.
3. Put intangibles under a special ad valorem property tax.
4. Levy a tax on the yield from intangibles.

1. *Exempt intangibles from taxation*

This could be done by amending Article VIII, Section 1 of the Constitution to delete or modify the requirement that intangible property be taxed. (Senators Ray Farabee and Grant Jones introduced a proposed Constitutional Amendment (SJR 1) during the 1977 Special Session

that would have exempted intangibles from the property tax. It was never brought to a vote.) The amendment could exempt all intangibles from the property tax. Or, it could be written so that the existing tax on bank stock and intangibles owned by utilities could continue, while exempting all other intangibles. Banks and utility companies would undoubtedly work hard to include their intangibles in the exemption.

This approach would be the simplest since it merely legalizes the status quo, or changes it slightly by removing the tax on bank and utility intangibles. However, it would be the least beneficial for the state's property taxpayers. First, a very large potential source of state revenue would continue to be ignored. Also, unless the amendment continued the tax on bank stock and utility intangibles tax revenues would fall since the fifty to seventy-five million dollars in existing annual tax collections from these sources would be lost.

2. *Take steps to apply the regular ad valorem property tax to intangibles*

The legislature could simply instruct local assessors to begin putting intangibles on the tax rolls. However, assessors would probably have a very diffcult time locating intangible assets. Jurisdictional problems might also develop regarding where intangibles should be taxed. Evasion of the tax would be very easy. Few intangibles would be likely to actually wind up on the tax rolls. Measures could be taken to aid the assessors in locating intangibles. Individuals could be required to report the intangibles they own to the assessor of the county in which they live. This procedure is now used in Kentucky. This system

still relies on self-reporting of assets, and evasion is still possible.

Kentucky and other states attack this problem by empowering a state agency to locate and assess intangibles. In Texas, the role of the State Intangibles Tax Board could be expanded to give it the power to collect information about all intangibles owned by state residents. Banks, corporations, and other financial institutions could be required to inform the Board about ownership of intangibles by state residents. The Board could use Internal Revenue Service data to verify its records. The Board would calculate the amount of intangible assets owned by each state resident, and would forward the information to local assessors. The assessors would then put the assets on the tax rolls and collect the taxes.

The advantage of this approach is that it would produce large amounts of revenue from property owners who could generally afford to pay the taxes. It would allow state government agencies to help locate intangibles but it would permit the continued use of local tax levies and collection. It would not require a constitutional change.

The disadvantages of this system are that it adds still more complexity to the property tax system. Statewide determination of the value of all intangible property might be a very diffcult task. The question of how to allocate assets among the state's hundreds of tax districts is sure to be a controversial one. The system would not allow use of an exemption for small amounts of intangibles owned by poor individuals. And the plan is likely to be opposed both by local assessors who resent any state in-

terference in their work and by wealthy individuals who would rather not have their assets taxed.

3. *Put intangibles under a special ad valorem property tax*

It might be desirable to tax intangibles at lower rates than those applied to real property. Or, different types of intangibles could be taxed at different rates. For example, some states tax mortgages and pension assets at very low rates. Finally, many advocates of taxing intangibles favor exempting the first several thousand dollars of assets owned by each individual to protect poor people from the tax.

A constitutional amendment would be needed to authorize any programs of this nature, since the Constitution now requires all property to be taxed uniformly. Once the Constitution was amended the tax rates on different classes of intangibles could be set by the legislature. (Some state legislatures set maximum rates for different types of intangibles, leaving it up to local tax districts to decide the actual tax rate they want to use.)

Under this special ad varolem tax plan, the State Intangibles Tax Board could be used to locate intangibles, as in the alternative discussed above. Collection of the taxes could be done either by the state or by local assessors.

The main advantage of this plan is that it would give the legislature a great deal of flexibility in designing the intangibles tax. A resulting disadvantage is that it would permit the creation of loopholes that might weaken the effect of the tax. Also, the constitutional amendment needed to authorize the tax might not be popular with the voters.

4. *Levy a tax on the yield from intangibles*

This would be quite similar to the previous approach. However, the yield tax would avoid some of the problems involved in ad valorem taxation of intangibles. Since only yield would be considered, there would be no need to determine the value of all intangibles. And information on yield is obtainable from the Internal Revenue Service and from the corporations, banks, and other organizations that make the payments.

A number of variations on this approach are possible. The tax could be levied and collected by the state or the job could be done at the local level once the state determined the amount of taxable yield for each taxpayer. The revenue from a state-collected tax could be put in the General Fund or it could be distributed to local tax districts.

The advantage of the yield tax is that it would be the simplest to administer while still producing a great deal of revenue. It would be the best tax from an "ability-to-pay" viewpoint since it would tax only assets that are currently producing income.

However, there would probably be disputes over who should levy and collect the tax and how the revenues from it should be distributed. And it might be opposed as setting a precedent for increased state government participation in the administration of the local property tax. Finally, the Texas Constitution now specifies that property must be taxed in proportion to its value. In many cases, such as securities that appreciate in value but produce no dividends or other current yield, the annual yield from intangible assets is not at all proportion-

al to their value. As a result, a yield tax could not be used to satisfy the constitutional requirement that intangibles be subject to the ad valorem property tax.

If the Legislature found it desirable to use a yield tax in place of an ad valorem tax on intangibles, several actions would be needed. A constitutional amendment would be required to remove intangibles from the ad valorem tax. The yield tax could be instituted either by statute or by constitutional amendment. The existing constitutional authority to tax income could probably be used to authorize a tax on the yield from intangibles. However, a constitutional amendment mandating the tax might be preferable so that the tax would be firmly established. This would be especially important once intangibles were exempted from the ad valorem property tax.

CONCLUSIONS

Should intangibles be taxed? Many people think they should not be subject to any tax. For example, one economist writes:

> Property taxation of intangibles is thus open to condemnation on the counts of both theory and practice. Intangibles do not constitute a separate ability to pay nor do they derive significant benefits separate from those accruing to the wealth which they represent. Clearly there are no theoretical grounds upon which their taxation can be justified.

But the opinion on this point is sharply divided. A different author states the case in favor of taxing intangibles in this way:

> Intangibles taxation will massively reverse the growing tendency to shrink the property tax base for special interest groups who can persuade defensive state legislatures that one property tax loophole deserves another. . . . It would recognize that wealth is still some measure of ability to pay and that intangible property and its owners as well as real property and its owners benefit from ordered government.

The Legislature may soon have to choose between these two views.

APPENDIX

As mentioned on page 3, applying the property tax to intangibles should have the effect of reducing the amount of federal income taxes paid by Texas residents. This would happen because the owners of intangible assets will be able to receive large federal tax deductions if they have to pay property taxes on the intangibles.

An example should help to clarify this. Consider two residents of a tax district:

> Mr. X earns a salary of $8,000 a year, which puts him in the 20% federal tax bracket. He owns a house with a market value of $40,000.
>
> Ms. Y earns a salary of $42,000 a year, which puts her in the 50% federal tax bracket. She owns corporate bonds worth $40,000 but owns no real property.

If the district's effective property tax rate is 1% of market value, Mr. X currently pays $400 (or 1% of $40,000) in property taxes on his house. He is able to deduct these taxes on his federal income tax return, saving him $80 (or 20% of $400) in income taxes. Ms. Y now pays no property taxes, and therefore is not entitled to any tax deduction.

Suppose that half of the property in the tax district is real property now subject to the ad valorem tax. The other half is intangible property not previously taxed. If the district begins to tax intangibles on the same basis as real property, the tax base will double, allowing the tax rate to fall from 1% of market value to 0.5%.

Mr. X will then pay only $200 (or 0.5% of $40,000) in property taxes. His federal tax deduction will also be cut in half, so his savings will be only $40. But now Ms. Y will have to pay property taxes on her bonds. Her tax will also be $200 (0.5% of the bonds' $40,000). She will be able to deduct this tax on her federal tax return. Since she is in the 50% bracket, the deduction will save her $100 (or 50% of the $200 property tax payment) in income taxes.

The income tax deductions can be thought of as a federal government "contribution" towards the local property taxes. This federal share when only real property was taxed was the $80 that Mr. X saved on his income tax. When intangibles were added to the tax rolls the federal share jumped to $140 ($40 via Mr. X and $100 via Ms. Y). The table on the following page summarizes this example.

	Existing situation with tax on real property only		New situation with tax on intangibles added	
Property tax payments:				
Mr. X	$400		$200	
Ms. Y	0		200	
Total	$400		$400	
Savings on federal income tax paid:				
Mr. X	$80	(=20% of $400)	$ 40	(=20% of $200)
Ms. Y	0		100	(=50% of $200)
Total	$80		$140	
Net contribution to local tax district:				
Mr. X	$320	(=$400 - $80)	$160	(=$200 - $40)
Ms. Y	0		100	(=$200 - $100)
Federal government	80		140	
Total	$400		$400	

Mr. X (the middle-income taxpayer) saves half of his original net tax payment, or $160. Ms. Y (the upper-income taxpayer) previously paid no property taxes, but now pays a net amount of $100. And the federal "contribution" to local property tax revenues rises from $80 to $140. The higher the income of the people who own intangibles, the greater will be the added federal contribution to local government revenues.

Several things should be noted about this example. First, it is not likely that enough intangibles would be added to the tax base to reduce the tax rate by half. Second, this calculation would be altered if Congress makes any changes in the rules for deductibility of local

taxes on federal income tax returns. And finally, the example shows that even with the addition of intangibles to the tax rolls the property tax would still "cost" the higher-income person less ($100 compared to $160 for the middle-income person) for a given amount of property once federal tax savings were taken into account. So the taxation of intangibles would make the property tax less regressive but would not turn it into a progressive tax.

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D. BRODY

APPENDIX H

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CIVIL ACTION NO. A-76-CA-223

LESLIE C. WILSON, et al.

v.

M. L. BROCKETTE, COMMISSIONER OF EDUCATION OF THE STATE OF TEXAS

CIVIL ACTION NO. A-77-CA-21

N. T. BENNETT, et al.

v.

M. L. BROCKETTE, COMMISSIONER OF EDUCATION OF THE STATE OF TEXAS

(Filed July 18, 1977)

ORDER

Came on this day for consideration by the Court the above styled causes. The Court, having carefully considered the Plaintiffs' applications for preliminary injunction, the evidence and oral argument adduced at the

hearing on the applications for preliminary injunction, the brief in support of the applications and all the other papers on file in these cases, is of the opinion that the applications for preliminary injunction should be denied.

These cases challenge the constitutionality of the provisions of the *Texas Education Code* that set up the scheme for allocating state funds to local school districts, alleging that the system for determining what amount of state funds will be allocated to each local school district violates the federal Equal Protection Clause and TEX. CONST. art. VIII, § 1 and statutes implementing art. VIII, § 1. Plaintiffs seek a preliminary injunction to insure that there will be adequate funds available to redress any injury that they have suffered in the event that they are successful on the merits. Defendant denies that any such injunction is warranted under the facts in these cases.

In order to be entitled to preliminary injunctive relief, a plaintiff must meet "the high threshhold burden of proving, '(1) a substantial likelihood that [he] will prevail on the merits, (2) a substantial threat that [he] will suffer irreparable injury if the injunction is not granted, (3) that the threatened injury to [him] outweighs the threatened harm the injunction may do to the defendant, and (4) that granting the preliminary injunction will not disserve the public interest.' " *Hillsboro News Company v. City of Tampa*, 544 F.2d 860, 861 (5th Cir. 1977). The Court will address each of these requirements separately as they relate to the final form of preliminary injunctive relief that was requested by Plaintiffs at the hearing on their application for preliminary injunction (i.e. that the Defendant be required to keep sufficient money in reserve to allow him to pay Plaintiffs any money

to which they might be entitled as a result of the outcome of these cases).

The first element that a plaintiff must prove in order to be entitled to a preliminary injunction is that he has a substantial likelihood of prevailing on the merits. In the instant case, this means that the Plaintiffs must demonstrate that they have a substantial likelihood of prevailing on either their federal constitutional claim or the pendent state law claim. The gist of Plaintiffs' federal equal protection claim is that the Defendant's formula for distributing state funds to local school districts irrationally classifies school districts' abilities to raise local tax money to support public schools according to the value of real estate and automobiles within the districts, failing to take into account other tangible personalty and all intangible personalty, which is taxable under Texas law. The gist of Plaintiffs' pendent state law claim is that Defendant has adopted a system for determniing how much taxable property is located in each local school district (the "Official Compilation") that does not include all of the property that is made taxable by the Texas Constitution and statutes, and thus, the system is illegal under Texas law.

The evidence adduced at the hearing on the applications for preliminary injunction shows that it is almost uncontroverted that the "Official Compilation" does not actually reflect the true value of all taxable property in each school district in that it fails to take into account the value of most tangible personal property, except automobiles, and the value of most, if not all, intangible personal property. Likewise, the evidence adduced at the hearing shows that it is almost uncontroverted that the

effect of this defect in the "Official Compilation" is not evenly distributed among all school districts. Specifically, the "Official Compilation" presents a much more accurate picture of the total taxable property in rural areas (where a higher percentage of all taxable property in real estate as opposed to personalty) than it does in urban areas (where personalty constitutes a higher percentage of all taxable property than is the case in rural areas).

The result of this disparity in the "Official Compilation," when the figures are used in the statutory formula to determine how much state aid will be given to each school district, is to require that rural school districts raise a much larger proportion of the costs of operating their schools (through local school taxes) than is required of urban school districts, when compared to their tax base, and consequently, rural school districts receive a smaller proportion of state aid, in comparison to their relative tax bases, than do urban school districts. In sum, school districts with the same amount of taxable property, but distributed differently as between realty and personalty, are treated differently in the distribution of state funds to support public education.

This system of distributing state funds to support public education violates the federal Equal Protection Clause. The Court is well aware of the fact that legislatures have broad discretion and power to classify in the field of taxation, *see San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 40-41 (1972), but this does not mean that a state's taxing and disbursing decisions are immune from federal constitutional scrutiny. *See Levy v. Parker*, 346 F. Supp. 897 (E.D. La. 1972) (three judge court), *aff'd mem.*, 411 U.S. 978 (1973).

There is no constitutional infirmity in the Defendant distributing state funds to local school districts on the basis of their equalized ability to raise local funds, as determined by the total amount of taxable property in each school district, but the Defendant may not constitutionally distribute state funds to local school districts on the basis of the amount of certain classes of taxable property in each district, while ignoring other classes of taxable property in each school district, without any rational basis for so discriminating between different types of taxable property. The Defendant's current system of distributing state aid to local school districts treats local school districts (and their taxpayers) with the same amount of taxable property differently, without any rational basis, thus violating the federal Equal Protection Clause.

Likewise, the current system of distributing state funds for education to local school districts violates the applicable provisions of state law. TEX. CONST. art. VIII, § 1 provides that "Taxation shall be equal and uniform. All property in this State, . . . shall be taxed in proportion to its value. . . ."TEX. REV. CIV. STAT. ANN. art. 7145 provides that "All property, real, personal or mixed, . . . is subject to taxation. . . ." TEX. REV. CIV. STAT. ANN. art. 7147, which defines personal property, makes it clear that all personal property, both tangible and intangible, is subject to taxation. In interpreting the Texas requirement that all property be taxed, the Texas Supreme Court has stated:

> The deliberate adoption of a plan for the omission from the tax rolls of a large volume of property, personal or real, is in direct contravention of constitutional and statutory provisions for equality and uniformity of taxation. Article VIII, Section 1, Constitution of Texas, Vernon's Ann. St.; Article 7147, Vernon's Annotated Civil Statutes, 1925. Such a plan of taxation results in the rankest kind of discrimination between taxpayers. It does not lie with local taxing authorities to say that certain classes shall bear the entire burden of ad valorem taxes.

City of Arlington v. Cannon, 271 S.W.2d 414, 416 (Tex. 1954). The above authority makes it clear that state officials are not at liberty to choose what is to be considered taxable property and what should be excluded from that classification. The clear implication is that whenever public officials take any actions regarding taxable property they must consider all of the property that is made taxable by state law, and not just that which seems best to them. Thus, Defendant cannot devise a formula for the distribution of state aid to local school districts based on certain classes of taxable property. In fact, TEX. EDUC. CODE ANN. § 16,252(a) provides that the formula for distributing state aid to local school districts is to be based on the "total taxable value of property in the district." Thus, the formulation of an "Official Compilation" that includes only the values for certain classes of property contravenes the provisions of the *Texas Education Code* that provides that the distribution formula is to be based on the total value of taxable property in each school district. The Defendant's distribution of state aid to local school districts by means of the values in the "Official Compilation" violates state law. Therefore, Plaintiffs have carried their burden of proving a substantial likelihood of success on the merits of both their federal constitutional claim and their pendent state law claim.

The second element that a plaintiff must prove in order to be entitled to a preliminary injunction is that there is a substantial threat that he will suffer irreparable injury if the injunction is not granted. The preliminary injunctive relief sought by Plaintiffs is to insure that there will be adequate funds available to redress any injury to the Plaintiffs if they are successful on the merits of the cases. Since the Defendant is a state official and any funds would necessarily have to come from the state, Plaintiff's requests for injunctive relief might raise a substantial Eleventh Amendment problem were it not for the fact that the Defendant has assured the Court that he would pay any funds due to the Plaintiffs if they are successful on the merits and that funds will be available without the need of specifically having the funds set aside by Court order. Although this assurance vitiates the Eleventh Amendment problem, it also establishes that Plaintiffs will suffer no irreparable injury even if the Court were to deny the requests for a preliminary injunction. All of the evidence adduced at the hearing establishes that there is no irreparable injury that will befall Plaintiffs if the preliminary injunction is denied.

The third element that a plaintiff must prove in order to be entitled to a preliminary injunction is that the threatened injury to him outweighs the threatened harm the injunction may do to the defendant. In the facts of these cases, Plaintiffs will not be harmed if the requests for preliminary injunction are denied and Defendant would not be harmed if they were granted, so that this element of the requisites for preliminary injunctive relief cancels itself out.

The final element that a plaintiff must prove in order to be entitled to a preliminary injunction is that granting a preliminary injunction will not disserve the public interest. Since the final form of Plaintiffs' requests for a preliminary injunction would not cause any interference with the payment of funds to other school districts under the challenged method of allocating state funds to local school districts, but rather only insure that money will be available to pay Plaintiffs what they claim would be owed them under a proper scheme of distribution, granting such an injunction would not disserve the public interest in any way. Nevertheless, a preliminary injunction cannot be granted, because the Plaintiffs have failed to establish that failure to grant a preliminary injunction would cause them any irreparable harm.

These are rather unusual cases in that Plaintiffs have established a very substantial probability of success on the merits in proving that the Defendant's actions have violated both the federal constitution and the state constitution and statutes, but nevertheless, Plaintiffs are not entitled to a preliminary injunction. It should be emphasized that this Court's denial of Plaintiffs' applications for preliminary injunction does not in any way indicate that they will not succeed on the merits or that they will not be entitled to a permanent injunction against the Defendant's conduct if they are successful on the merits. Plaintiffs' application for preliminary injunction are being denied solely because there is no evidence that a preliminary injunction is necessary in order to keep the Plaintiffs from being irreparably injured. Accordingly, it is

ORDERED, ADJUDGED and DECREED that Plaintiffs' applications for preliminary injunction should be, and hereby are, DENIED. This Order shall constitute findings of fact and conclusions of law.

Entered this 18th day of July, 1977, at Austin, Texas.

/s/ JACK ROBERTS
Jack Roberts
United States District Judge

NO. 78-117

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

GRAY-TAYLOR, INC., etc.,
Petitioner

v.

HARRIS COUNTY, et al.
Respondents

PETITIONER'S SUPPLEMENTAL BRIEF

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PETITIONER'S SUPPLEMENTAL BRIEF

Pursuant to Paragraph 5 of Rule 24 of the Revised Rules of the Supreme Court of the United States, the Petitioner submits this Supplemental Brief to call the attention of the Court to the recent decision of the United States Court of Appeals for the Seventh Circuit in *Fulton Market Cold Storage Company v. Cullerton, et al.* (No. 77-2133 - August 7, 1978). For the convenience of the Court, we have reproduced that opinion as an appendix to this Supplemental Brief. We think this recent decision is important to this Court's consideration of the pending Petition for a Writ of Certiorari for the following reasons:

1. The Seventh Circuit held that neither the Tax Injunction Act (28 U.S.C. § 1341) nor its underlying policies prevented an action for damages under 28 U.S.C. § 1343 and 42 U.S.C. § 1983. (As the Seventh Circuit noted (App. 22-23), this conclusion had been assumed in *Sacks Brothers Loan Company v. Cunningham* (No. 77-1729, May 24, 1978), which was discussed at pp. 11-12 of the Petition.) The decision in *Fulton Market* squarely conflicts with the Court of Appeals' decision in the instant case denying the Petitioner a Federal Court forum for its request for damages.

2. The conflict highlights the importance of the issue. A Federal Court forum to redress deprivation of fundamental Constitutional guarantees has traditionally been viewed as essential to insuring the full protection of these guarantees. Policies of Federalism have overridden only in narrow circumstances. Thus, where there is an adequate State Court remedy, policies of Federalism have justified precluding Federal Court injunctive intervention into unconstitutional local tax plans. This denial of a Federal Court forum, and its subtly inhibiting effect (even assuming the presence of an "adequate" State Court remedy) upon the redress of violations of fundamental Constitutional rights, is acceptable only because of the drastic consequences that could attend the grant of an injunction. These conflicting decisions establish that it is far from a necessary conclusion that these same policies compel the same conclusion when the suit seeks damages for past unconstitutional property tax plans. Whichever result may be ultimately reached, the issue is plainly one of major Constitutional importance.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NO. 77-2133

FULTON MARKET COLD STORAGE COMPANY,
Plaintiff-Appellant,

v.

P. J. CULLERTON, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 74-C-5—George N. Leighton, Judge.

Argued February 15, 1978—Decided August 7, 1978

Before SWYGERT and TONE, Circuit Judges, and SHARP*, District Judge.

SHARP, District Judge.

I.

On January 2, 1974 Fulton Market Cold Storage Company ("Fulton") filed a civil rights damage action

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* The Honorable Allen Sharp, United States District Court for the Northern District of Indiana, is sitting by designation.

against the Cook County Assessor under 42 U.S.C. § 1983 and its jurisdictional counterpart 28 U.S.C. § 1343(3). Later Fulton amended its complaint and added a number of defendants and counts. In its amended complaint Fulton, a Cook County Illinois property owner, seeks actual and punitive damages for injuries allegedly inflicted upon it by county and state taxing officials. Fulton charges that these defendants, individually and as parties to a continuing conspiracy, acted and combined under color of law to deprive it of its rights under the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution, the due process provisions of the Illinois Constitutions of 1870 and 1970, Article IX, Section 1 of the Illinois Constitution of 1870, and various provisions of the Illinois Revenue Act, 120 Ill. Rev. Stat. §§ 482 *et seq.*

Specifically, Fulton alleges that from 1958 to 1973, the defendants have systematically, knowingly, intentionally, fraudulently and invidiously assessed its property at levels other than permitted by law and greatly in excess of the levels at which property in Cook County was generally assessed in those years. Fulton alleges that in 1968 and 1969 its property was deliberately assessed at two and one-half times the level at which property was generally assessed in Cook County in those years. Fulton's other allegations charge that the defendants' systems of illegal valuations and discriminatory assessments has been widely, wilfully and purposefully practiced in Cook County and has worked substantial injury upon Fulton.

The defendants fall into three groups: (1) Cook County Assessors P. J. Cullerton and Thomas M. Tully

("the Assessor Defendants") who, by statute, had the duty to assess real property in Cook County; (2) Cook County Board of Appeals members ("the County Defendants") who, by statute, had the duty to review and order corrected unlawful assessments brought before them on complaint; and (3) Directors of the Illinois Department of Revenue and the Illinois Department of Local Government Affairs ("the State Defendants") who, by statute, had the duty to equalize the total assessed valuations of the several counties so that such total assessed valuations as equalized equaled the full cash value of the property subject to assessment within the several counties and the duty to order a reassessment for any year in which they found that the assessments in any county were not in substantial compliance with the law.

For relief, Fulton's amended complaint prays for $60,000 plus the sums it has expended in the years 1958 through 1974 in seeking redress from the acts and conduct of the defendants, plus the damage to its business resulting therefrom and punitive damages.

The district court dismissed the plaintiff's amended complaint relying upon 28 U.S.C. § 1341 and its underlying policy considerations. Fulton appealed and the matter is now before this court.

II.

The central issue now before this court is whether 28 U.S.C. § 1341 or its underlying policy considerations bar the plaintiff's § 1983 suit for damages. After a careful review of all the authority cited by counsel and after an independent search for authority by this court, it appears

that no other court has ever directly addressed itself to this precise question. This court and several others have construed § 1341 in cases where the plaintiff was seeking some form of equitable relief, e.g., injunctive or declaratory actions. But no case has been found where this statute was extended to damage actions as well. Consequently, since this appears to be a case of first impression, this court must analyze § 1341 with reference to its legislative history and the significant cases which have construed the statute in order to determine the important underlying policy considerations. Only then may this court properly resolve the issue.

III.

28 U.S.C. § 1341

Title 28 U.S.C. § 1341 provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under the State law where a plain, speedy and efficient remedy may be had in the courts of such State.

As this court has held in the past, this statute clearly prohibits a district court from issuing an injunction which would "suspend or restrain the assessment, levy or collection of any tax under State law" unless the State remedy is not "plain, speedy and efficient." *28 East Jackson Enterprises, Inc. v. Cullerton,* 551 F. 2d 1093 (7th Cir. 1977) (on second petition for rehearing); *see also 28 East Jackson Enterprises, Inc. v. Cullerton,* 523 F. 2d 439 (7th Cir. 1975); *Pintozzi v. Scott,* 436 F. 2d 375 (7th Cir. 1970); *Tramel v. Schrader,* 505 F. 2d 1310

(5th Cir. 1975); and *Bland v. McHann,* 463 F. 2d 21 (5th Cir. 1972).

Additionally, despite the fact that § 1341 speaks only of injunctions, this court has held that the statute also bars declaratory actions. *Illinois Central R. Co. v. Howlett,* 525 F. 2d 178 (7th Cir. 1975); *Gray v. Morgan,* 371 F. 2d 172 (7th Cir. 1966). *See also Perez v. Ledesma,* 401 U.S. 82 (1971) (Brennan, J., concurring in part and dissenting in part); *Hickmann v. Wujick,* 488 F. 2d 875 (2d Cir. 1973); *American Commuters Ass'n v. Levitt,* 405 F. 2d 1148 (2d Cir. 1969).

While it is well settled that § 1341 may bar equitable relief, injunctive and declaratory, it is uncertain whether the policy considerations which underlie § 1341 may also bar an action for damages. To resolve this question properly it is important to examine the legislative history and congressional intent of § 1341.

Legislative History

The Fifth Circuit in *Hargrave v. McKinney,* 413 F.2d 320 (1969), explained the context in which § 1341 was enacted:

> The expansion of the federal judicial power countenanced by the Supreme Court in Ex parte Young, 1908, 209 U.S. 123, 28 S. Ct. 441, 52 L.Ed. 714, "brought about a major shift in the actual distribution of power between states and nation" which was not "overlooked by Congress, or by the spokesmen of the interests adversely affected." H. Hart and H. Wechsler, The Federal Courts and Federal System, pp. 846-847 (1953). Congress responded to the federal courts' newly-declared power

> to enjoin actions by state officials in their enforcement of state legislative acts by enacting four major pieces of legislation.

In a footnote, the court specified the legislation:

> (1) Three-judge requirement of 1910 presently codified in 28 U.S.C. § 2281. [now repealed Pub. L. 94-381, §§ 1, 2 Aug. 12, 1976, 90 Stat. 1119.]
>
> (2) The stay requirement of 1913 presently codified in 28 U.S.C. § 2284 (last paragraph).
>
> (3) Johnson Act of 1934 prohibiting injunctions against state public utility rate orders—presently codified in 28 U.S.C. § 1342.
>
> (4) Tax Injunction Act of 1937—at issue in the instant case. [codified in 28 U.S.C. § 1341]

Id. at 325 and n. 9.

It therefore appears that § 1341 was part of a larger congressional response to *Ex parte Young, supra,* wherein Congress attempted to limit the injunctive power of federal courts.

The specific congressional policy considerations which underlie § 1341 are revealed in the Senate Judiciary Committee Report. In the report, two purposes of § 1341 are expressed. First, the statute was directed at the elimination of unjust discrimination between citizens of the State and foreign corporations. It was feared that a foreign corporation, through diversity, could obtain a federal injunction prohibiting the collection of certain state taxes. Such a procedure, however, was unavailable to a State resident. As the Senate Judiciary Committee Report stated:

> If those to whom the federal courts are open may secure injunctive relief against the collection of taxes, the highly unfair picture is presented of the citizen of the State being required to pay first and then litigate, while those privileged to sue in the federal courts need only pay what they choose and withhold the balance during the period of litigation.

S. Rep. No. 1035, 75th Cong., 1st Sess. 1-2 (1937). The second purpose of § 1341 was also directed at foreign corporations. The primary concern was that foreign corporations, by obtaining a federal injunction, could seriously disrupt the State taxing process. As the Senate Report stated it was possible for

> foreign corporations doing business in such States to withhold from them and their governmental subdivisions taxes in such vast amounts and for such long periods of time as to seriously disrupt State and county finances. The pressing needs of these States for this tax money is so great that in many instances they have been compelled to compromise these suits, as a result of which substantial portions of the tax have been lost to the States without a judicial examination into the real merits of the controversy.

In *Tramel v. Schrader,* 505 F. 2d 1310 (5th Cir. 1975), Judge Coleman, writing for the Fifth Circuit, summarized the congressional intent in enacting § 1341:

> In other words, in passing the Tax Injunction Statute, Congress took aim at two evils.
>
> First, Congress noted that some foreign corporations were in the habit of delaying the payment of taxes through an action in federal court since they could invoke diversity jurisdiction. State citi-

> zens, on the other hand, could not obtain a federal forum based on diversity jurisdiction. By passing the Tax Injunction Statute, Congress sought to treat the two classes, foreign corporations and resident citizens, alike.
>
> Second, Congress noted that allowance of injunction suits in the federal courts inevitably resulted in delays in the collection of public revenues by the state and local governments. Because of pressing need for the money, the state and local governments often had to compromise the claims, taking less than what was, in fact, due. By closing the federal courthouse door to taxpayer claims, Congress sought to end this burdensome disruption of local financing.

Id. at 1316. *See also Garrett v. Banford,* 538 F. 2d 63 (3d Cir. 1976).

It should be noted that the legislative history of § 1341 speaks only of the concerns that are encountered by the use of injunctions. No mention is made of the applicability of this statute to actions which seek other relief. From a narrow reading of the statute one might infer that Congress intended to restrict only injunctive relief. However, as discussed earlier, this Court and several others have held that Congress' intention was best served by extending the jurisdictional bar of § 1341 to prohibit declaratory actions as well. *Illinois Central R. Co. v. Howlett,* 525 F. 2d 178 (7th Cir. 1975); *Gray v. Morgan,* 371 F. 2d 172 (7th Cir. 1966); *Hickmann v. Wujick,* 488 F. 2d 875 (2d Cir. 1973); *American Commuters Ass'n v. Levitt,* 405 F. 2d 1148 (2d Cir. 1969). These cases and others will now be analyzed to determine if the policy considerations and congressional intent of § 1341 would be served by extending the jurisdictional bar of the statute to prohibit damage actions as well.

Prior to the enactment of § 1341, a unanimous Supreme Court of the United States in *Matthews v. Rogers,* 284 U.S. 521 (1932), speaking through Mr. Justice Stone, discussed the sensitive nature of federal injunctions which enjoin the collection of a particular state tax:

> The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations require that such relief should be denied in every case where the asserted federal right may be preserved without it. Whenever the question has been presented, this Court has uniformly held that the mere illegality or unconstitutionality of a state or municipal tax is not in itself a ground for equitable relief in the courts of the United States. If the remedy at law is plain, adequate, and complete, the aggrieved party is left to that remedy in the state courts, from which the cause may be brought to this court for review if any federal question be involved, Jud. Code § 237, *or to his suit at law in the federal courts if the essential elements of federal jurisdiction are present.* See *Boise Water Co. v. Boise City,* 213 U.S. 276; *Shelton v. Platt,* 139 U.S. 591; *Dows v. Chicago,* 11 Wall. 108, 110, 112. (emphasis added)

Id. at 525-526.

The Supreme Court's primary concern in *Matthews* centered on the exercise of a federal court's formidable injunctive powers. The opinion apparently would permit a plaintiff to maintain an action at law seeking only damages.

Later in *Great Lakes Dredge & Dock Co. v. Huffman,* 319 U.S. 293 (1943), the Supreme Court of the United

States, speaking unanimously through Chief Justice Stone, extended the policy of self-restraint followed by courts in federal equity actions seeking to interefere with the collection of state taxes, a policy approved by Congress in its adoption of § 1341, to declaratory actions:

> It is true that the Act of Congress speaks only of suits "to enjoin, suspend, or restrain the assessment, levy, or collection of any tax" imposed by state law, and that the declaratory judgment procedure may be, and in this case was, used only to procure a determination of the rights of the parties, without an injunction or other coercive relief. It is also true that that procedure may in every practical sense operate to suspend collection of the state taxes until the litigation is ended. But we find it unnecessary to inquire whether the words of the statute may be so construed as to prohibit a declaration by federal courts concerning the invalidity of a state tax. For we are of the opinion that those considerations which have led federal courts of equity to refuse to enjoin the collection of state taxes, save in exceptional cases, require a like restraint in the use of the declaratory judgment procedure.

Id. at 299.

More recently in *Perez v. Ledesma,* 401 U.S. 82 (1971), Mr. Justice Brennan, concurring in part and dissenting in part, reiterated the sensitive policy considerations underlying the federal courts' historic non-intervention in state tax matters:

> The special reasons justifying the policy of federal non-intervention with state tax collection are obvious. The procedures for mass assessment and collection of state taxes and for administration and

> adjudication of taxpayers' disputes with tax officials are generally complex and necessarily designed to operate according to established rules. State tax agencies are organized to discharge their responsibilities in accordance with the state procedures. If federal declaratory relief were available to test state tax assessments, state tax administration might be thrown into disarray, and taxpayers might escape the ordinary procedural requirements imposed by state law. During the pendency of the federal suit the collection of revenue under the challenged law might be obstructed, with consequent damage to the State's budget, and perhaps a shift to the State of the risk of taxpayer insolvency. Moreover, federal constitutional issues are likely to turn on questions of state tax law, which, like issues of state regulatory law, are more properly heard in the state courts. See generally S. Rep. No. 1035, 75th Cong., 1st Sess. (1937). These considerations make clear that the underlying policy of the anti-tax-injunction statute, 28 U.S.C. § 1341, relied on in *Great Lakes,* bars all anticipatory federal adjudication in this field, not merely federal injunctions.

Id. at 127-128 n. 17.

Several other courts have reached the same conclusions. *See Tramel v. Schrader,* 505 F. 2d 1310 (5th Cir. 1975); *Mandel v. Hutchinson,* 494 F. 2d 364 (9th Cir. 1974); *Hickmann v. Wujick,* 488 F. 2d 875 (2d Cir. 1973); *Bland v. McHann,* 463 F. 2d 21 (5th Cir. 1972); *American Commuters Assoc. v. Levitt,* 405 F. 2d 1148 (2d Cir. 1969).

Unlike the previous cases which have applied § 1341 and have prohibited equitable relief, two cases have reached different results. In *Wells v. Malloy,* 510 F. 2d

74 (2d Cir. 1975), the plaintiff brought an action to enjoin the enforcement of a section of the Vermont Motor Vehicle Purchase and Use Tax Statute. The plaintiff, an indigent, claimed that the sanction for nonpayment of the tax (suspension of his driver's license) violated his constitutional rights. The district court held that the action was barred by § 1341 and dismissed the complaint for want of jurisdiction. The Second Circuit reversed. Judge Friendly, writing for the court, found that the plaintiff was not seeking to restrain the "assessment" or "levy" of a tax under state law. Indeed the plaintiff did not dispute that the tax was due and owing. Nor was the plaintiff's action an attempt to restrain the "collection" of a state tax. Judge Friendly, after examining the legislative history of § 1341, determined that the sanction for nonpayment of the Vermont tax was not encompassed in the term "collection" of § 1341:

> The context and the legislative history, see H.R. Rep. No. 1503, 75th Cong., 1st Sess. 2 (1937); Sen. Rep. No. 1035, 75th Cong., 1st Sess. 1-2 (1937); 81 Cong. Rec. 1415, 1416 (Feb. 19, 1937) (remarks of Sen. Bone), lead us to conclude that, in speaking of "collection", Congress was referring to methods similar to assessment and levy, *e.g.*, distress or execution, compare Murray's Lessee v. Hoboken Land and Improvement Co., 18 How. (59 U.S.) 272, 278, 15 L. Ed. 372 (1856); Damsky v. Zavatt, 289 F. 2d 46, 50-51 (2d Cir. 1961), that would produce money or other property directly, rather than indirectly through a more general use of coercive power. Congress was thinking of cases where taxpayers were repeatedly using the federal courts to raise questions of state or federal law going to the validity of the particular taxes imposed upon them—not to a case where a taxpayer contended

> that an unusual sanction for non-payment of a tax admittedly due violated his constitutional rights, an issue which, once determined, would be determined for him and all others.

Id. at 77.

Thus despite the fact the plaintiff did not pursue any state remedies, the court held that § 1341 did not bar his action.

In *Hargrave v. McKinney,* 413 F. 2d 320 (5th Cir. 1969), the Fifth Circuit held that § 1341 did not bar an action which challenged the constitutionality of a Florida statute.

After analyzing these cases it is clear that § 1341 bars any action which seeks equitable relief which if granted would disrupt the state taxing process. Thus an action which seeks to enjoin the "assessment, levy or collection of any tax under state law" may be prohibited. Likewise, an action which seeks a declaratory judgment may also be barred, since a declaration that a particular state tax statute is unconstitutional would have a crippling effect upon the state taxing process. So long as the states provide plaintiffs with a "plain, speedy and efficient remedy" in the state courts, the plaintiffs are precluded from pursuing equitable relief in federal courts.

The cases in this circuit are in accord. *28 East Jackson Enterprises, Inc. v. Cullerton,* 523 F. 2d 439 (7th Cir. 1975), on second petition for rehearing, 551 F. 2d 1093 (7th Cir. 1977); *Illinois Cent. R. Co. v. Howlett,* 525 F. 2d 178 (7th Cir. 1975); *Gray v. Morgan,* 371 F. 2d 172 (7th Cir. 1966). In each case, the plaintiffs were seeking some form of equitable relief which, if granted,

would have disrupted the state taxing process. In *Cullerton, supra,* the plaintiffs were seeking an injunction. In *Illinois Cent. R. Co., supra,* the plaintiffs were seeking a declaratory judgment. In *Gray, supra,* the plaintiffs were seeking an injunction, declaratory judgment and a tax refund. In each case this court determined that the plaintiffs had an adequate state remedy and held that § 1341 barred the action. As Chief Judge Hastings stated in *Gray:*

> We hold that § 1341 means what it says, and having determined to our own satisfaction that plaintiffs have available to them a plain, speedy and efficient remedy in the Wisconsin state courts, they may not use a federal forum to seek the equitable relief sought here against the state income taxes in question.

371 F. 2d at 175.

IV.

In the present case the plaintiff argues that the significant difference is the relief sought. Fulton concedes that were it seeking some form of equitable relief § 1341 would bar its suit. However, since it seeks damages for the allegedly wrongful conduct of officials, Fulton argues that § 1341 or its underlying policy considerations are inapplicable. Furthermore, Fulton contends that the purpose of § 1983 suits would be thwarted if § 1341 were construed to bar damage actions as well.

This court agrees with the plaintiff's argument. As has been demonstrated, § 1341 is directed at prohibiting equitable relief. The statute, its legislative history and significant cases indicate that the primary evil to be avoided is federal equitable relief which would disrupt

the state taxing process. A federal court injunction or declaratory judgment would not only undermine and jeopardize a state's ability to collect its revenue but would also seriously damage the delicate balance inherent in our federalistic system of government.

These concerns are not present in a suit for damages. In the present case the plaintiff is not seeking to enjoin any taxing process. Nor will a judgment for the plaintiff have that effect. Fulton is seeking damages for the alleged wrongful and intentional conduct of certain officials who allegedly deprived Fulton of constitutional rights while acting under color of state law. Fulton seeks relief which is retrospective, i.e., compensation for harm done, unlike equitable relief which is anticipatory or prospective. Additionally, the outcome of the present suit does not pivot upon the construction of some state statute or tax regulation which should more properly be construed by appropriate state courts. The issue is not whether a state statute is constitutionally valid but rather whether an official's conduct violated established constitutional standards. This is precisely the purpose of § 1983 suits. As Mr. Justice Douglas stated, writing for the Supreme Court of the United States in *Monroe v. Pape,* 365 U.S. 167 (1961):

> There can be no doubt at least since *Ex parte Virginia,* 100 U.S. 339, 346-347, that Congress has the power to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it. See *Home Tel. & Tel. Co. v. City of Los Angeles,* 227 U.S. 278, 287-296.

Id. at 171-172.

Later, in *Mitchum v. Foster*, 407 U.S. 225 (1972), the Supreme Court of the United States reiterated that position:

> Section 1983 opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation.

Id. at 239 (footnote omitted).

And more recently in *Carey v. Piphus*, ... U.S. . . . . , 46 U.S.L.W. 4224 (March 21, 1978), Mr. Justice Powell writing for the court stated:

> The legislative history of § 1983 elsewhere detailed, *e.g., Monroe v. Pape*, 365 U.S. 167, 172-183 (1961); *id.*, at 225-234 (Frankfurter, J., dissenting in part); *Mitchum v. Foster*, 407 U.S. 225, 238-242 (1972), demonstates that it was intended to "create[] a species of tort liability" in favor of persons who are deprived of "rights, privileges, or immunities secured" to them by the Constitution. *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976).

Id. at 4225-26.

It should be noted that the fact that the plaintiff in this suit is a corporation is of no legal significance. While a corporation is not a "citizen" within the meaning of the privileges and immunities clause, *Hague v. Committee for Industrial Organization*, 307 U.S. 496 (1939); *Orient Ins. Co. v. Daggs*, 172 U.S. 561 (1899); *Paul v. Virginia*, 75 U.S. (8 Wall) 168 (1868); *see also Asbury Hospital v. Cass County, N.D.*, 326 U.S. 207 (1945), a corporation is a "person" within the meaning of the equal

protection and due process of law clauses of the Fourteenth Amendment, *Grosjean v. American Press Co.*, 297 U.S. 233 (1936); *Adams v. City of Park Ridge*, 293 F. 2d 585 (7th Cir. 1961); *Advocates for Arts v. Thompson*, 532 F. 2d 792 (1st Cir. 1976); *Raymond Motor Transportation, Inc. v. Rice*, 417 F. Supp. 1352 (3-Judge Dist. Ct. W.D. Wis. 1976). Accordingly, Fulton, the corporate plaintiff, may maintain a § 1983 action to secure the protection and guarantees accorded to it under the Fourteenth Amendment.

Furthermore, as announced in *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972), the distinction between personal liberties and proprietary rights as a guide to the contours of a § 1343(3) jurisdiction is likewise meaningless. It is true that the Supreme Court in *Lynch* in footnote 6 indicated an exception to this rule in cases which were barred by § 1341. However, since this court has already determined that § 1341 is inapplicable, the exception alluded to in the footnote in *Lynch* is likewise inapplicable.

The defendants argue that the policy considerations of § 1341 would be best served by this court holding that § 1341 bars all actions, equitable and legal. We cannot agree. After reviewing the statute, its legislative history and significant cases we can find no evidence which would indicate that § 1341 was directed at damage actions as well as equitable actions. Clearly if Congress had intended to prohibit all federal court relief in state tax matters, it could have done so. Congress, however, did not address the subject of damage actions. Congress thus did not give state tax officials absolute immunity for acts committed in their official capacity. Congress only prohibited certain

specific remedies which due to their nature are highly disruptive of state proceedings. Quite clearly, if a county or state tax official intentionally and unjustifiably raised an individual's property assessment merely because of the individual's race, ethnic background or political affiliation, the official could be liable for damages under § 1983 for the misuse of his authority. Section 1341 only bars certain forms of relief; it does not serve to deprive a federal court of jurisdiction of all actions merely because the defendant is a state or county tax official. If a state or county tax official intentionally violates a plaintiff's constitutional rights, he may be held liable for an action for damages.

We note that in a recent decision of this court the point we decide today was assumed by the parties and the court. In *Sacks Brothers Loan Co. v. Cunningham,* (No. 77-1729, May 24, 1978), the plaintiff filed an action against the tax assessor of Marion County, Indiana seeking damages and equitable relief pursuant to 28 U.S.C. § 1343 and 42 U.S.C. § 1983. The gravamen of the complaint was that the imposition of an Indiana personal property tax on certain tangible personal property held by the plaintiff violated the plaintiff's rights under the Equal Protection Clause of the Fourteenth Amendment. The district court dismissed the plaintiff's claim for equitable relief relying upon 28 U.S.C. § 1341 and dismissed the claim for damages for failure to state a claim upon which relief can be granted. This court affirmed the district court's denial of equitable relief but reversed the district court's dismissal of the plaintiff's damage action on the ground that the district court had applied the incorrect statute of limitations for damage actions arising under § 1983. In so doing, this court

necessarily assumed the existence of a § 1983 cause of action for damages against a county tax assessor.

While we now hold that § 1341 does not bar a § 1983 action for damages, that is not to say that whenever a tax official raises a property assessment he exposes himself to a § 1983 suit. In order to insure that county or state tax officials will not exercise their legitimate discretion with undue timidity for fear of suit, they are entitled to a good faith defense as announced in *Wood v. Strickland,* 420 U.S. 308 (1975). Therefore, we hold that a state or county tax official will be liable for damages under § 1983 only if he violated the plaintiff's clearly established constitutional rights intentionally or with reckless disregard of those rights. Inadvertence or negligence will not be enough. Thus, to paraphrase *Wood v. Stickland, supra,* a compensatory award will be appropriate only if the tax official has acted with an impermissible motivation or with such intentional or reckless disregard of the plaintiff's clearly established constitutional rights that his action cannot be reasonably characterized as being in good faith. *Id.* at 332. *See also Procunier v. Navarette,* . . . . . U.S. . . . . ., 46 U.S.L.W. 4144 (Feb. 22, 1978).

Furthermore, while we now hold that the plaintiff has stated a cause of action under § 1983, we leave for the district court to determine on a more complete record whether any of the defendants have had the necessary personal involvement to incur liability. As this court has held in *Adams v. Pate,* 445 F. 2d 105 (7th Cir. 1971), there is no vicarious liability under § 1983; *respondeat superior* is inapplicable. *See also Monell v. Department of Social Services of the City of New York,* . . . . . U.S.

. . . . ., 46 U.S.L.W. 4569 (June 6, 1978); *Draeger v. Grand Central, Inc.*, 504 F. 2d 142 (10th Cir. 1974); *Johnson v. Glick*, 481 F. 2d 1028 (2d Cir. 1973); *Jennings v. Davis*, 476 F. 2d 1271 (8th Cir. 1973). Accordingly, any defendant who did not personally and intentionally or with reckless disregard violate the plaintiff's constitutional rights will not be held liable for damages. This is a matter which the district court must address on remand and may address preliminarily to any trial on the merits.

Another issue the district court will address on remand is whether any of the plaintiff's claims is barred by the appropriate statute of limitations. Since the district court dismissed the plaintiff's complaint relying upon 28 U.S.C. 1341, it never reached the statute of limitations question. Although the defendants have argued the question on appeal, we feel the better course, in light of our opinion today, is to permit the district court to address the issue upon a more complete record and following our decision in *Beard v. Robinson*, 563 F. 2d 331 (7th Cir. 1977). Therefore, on remand, the district court must decide this statute of limitations question on a fully developed record.

The defendants also argue that even if the plaintiff has stated a cause of action under § 1983 that the district court should abstain or defer because the plaintiff has not exhausted his state remedies. We find no merit in this argument and see no reason why this § 1983 action should be treated differently from others where exhaustion is not required. As stated in *Monroe v. Pape*, 365 U.S. 167 (1961), referring to § 1983 actions:

> It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.

Id. at 183.

See also McNeese v. Board of Ed. for Com. Unit. Sch. Dist. 187, 373 U.S. 668 (1963); *Drexler v. Southwest Dubois School Corp.*, 504 F. 2d 836 (7th Cir. rehearing en banc 1974). Even if § 1983 were a supplementary remedy, *see Askew v. Hargrave*, 401 U.S. 476 (1971), the unavailability in the Illinois courts of certain elements of plaintiff's damage, i.e., interest and attorney's fees, would make the federal remedy necessary to afford complete relief.

Accordingly, in light of all the foregoing, we now hold that the plaintiff, Fulton Market Cold Storage Company, has stated a cause of action under 42 U.S.C. § 1983 which is not barred by 28 U.S.C. § 1341. The order of the district is therefore now REVERSED and the case now REMANDED for proceedings consistent with this opinion.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

NO. 78-117

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

GRAY-TAYLOR, INC., etc.,
Petitioner,

v.

HARRIS COUNTY, TEXAS, et al.
Respondents

RESPONDENT GOVERNMENT'S BRIEF

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RESPONDENT GOVERNMENT'S BRIEF

BACKGROUND

TO THE HONORABLE COURT:

In Texas, prior to the institution of this suit, a statewide organization of new auto dealers agreed to initiate a concerted effort at the state and local levels to force reduction in ad valorem taxes on their inventories of automobiles and auto parts. Under Texas law all ad valorem taxes of the sort in issue are exacted through local units of government. The ad valorem taxes exacted by and in behalf of the *State of Texas* are collected through the 254 county governments in the State and Harris County, one alleged defendant herein, collects a significant percentage of the *State's* ad valorem taxes.

Sometime prior to June 17, 1977, when the suit in question was filed, the members of the Houston Auto-

mobile Dealers Association pooled their financial resources to institute this suit—first in State Court and secondly in Federal Court. Tom Gray, acting through his alter ego corporations was the front man. The dealers had been told by their attorneys that the County and other units of government would probably settle the entire matter quickly after suit because of the suit's threat to each unit's financial stability, including their crucial municipal bond ratings, etc.

On June 17, 1977, Tom Gray, acting through his closed corporation, "Tom Gray Datsun", filed suit in State Court and approximately an hour later Tom Gray, acting through a different closed corporation called "Gray-Taylor, Inc." filed an identical suit in Federal Court. The record reveals that Tom Gray Datsun (the Plaintiff in the State action) and Gray-Taylor, Inc. (the Plaintiff in the Federal action) are both closed corporations owned by almost exactly the same persons. Page 91, Appellants Appendix, Fifth Circuit:

> "T. G. MOTORS OF HOUSTON, C. A. File 13,947 (Plaintiff in State Suit)
>
> | | |
> |---|---|
> | 1. Incorporated | Mar. 29, 1971 |
> | 2. Registered Agent: | Tom Gray |
> | 3. Incorporators: | Carlisle, Urban, Joel Collidge, John Feldt |
> | 4. Directors: | Tom Gray, Robert H. Taylor, B. G. Moore |
>
> GRAY-TAYLOR, INC., C. A. File 13,946 (Plaintiff in Federal Suit)
>
> | | |
> |---|---|
> | 1. Incorporated: | Mar. 29, 1969 |
> | 2. Registered Agent: | Tom Gray |
> | 3. Incorporators: | Carlisle Urban, Brian Scott Frank Naegle |
> | 4. Directors: | Tom Gray, Bob Taylor, John M. Gray" |

For purposes of this suit and the issues contained herein, the State Plaintiff and the Federal Plaintiff are the same. This is especially so since the alleged "classes" Tom Gray sought and seeks to represent are the same and the wording in the pleadings is virtually identical.

It should be noted from the exhibits filed by Plaintiffs below that the original pleading filed by Gray-Taylor, Inc., only sought equitable relief. After filing a motion for preliminary injunction and a lengthy trial brief in furtherance of their equitable relief, Gray-Taylor finally amended their original Federal pleadings to request "damages" in addition to the other allegations. The claim for unspecified "damages" was clearly an afterthought and the primary thrust of the suits lay in equity.

Judge Carl O. Bue, the constitutional trial forum, is appointed by law in such circumstances to view the entire documentary record along with the totality of the evidence and decide the issues presented by motion. In view of the entire record of this case Judge Bue decided *in his discretion* that abstention was appropriate. Plaintiff, petitioner now seeks to have a higher Court rule that said wise Court has abused its discretion. That is, Appellants would have a higher Court displace the constitutional discretion of the Federal District Court where the District Court has carefully weighed every salient element of the action over a significant period of time and entered his succinct ruling thereafter. Said Court has proven through its tenure that it is not one to shirk its constitutional duties, but in fact has normally construed the parameters of its jurisdiction and authority liberally in every way.

Petitioners herein have pursued their parallel State action with vigor. Said Plaintiffs have dragged Respond-

ents to several Texas cities for involved depositions and have held several hearings in State Court in that parallel case. We are sure it is the consummate wish of every Plaintiff to have as many bites at the apple as possible, but Courts should not encourage a multiplicity of parallel suits nor encourage the shotgun approach in an era of overcrowded dockets at every level of government.

Additionally, Respondents say that this suit, as originally filed and as the closed pleadings facially read, is wholly moot as to the equitable relief sought and is incapable of Federal determination as to damages. This latter assertion is so because the *State of Texas* is an indispensable party to this suit, and said sovereign is not subject to suit in the subject forum under the 11th Amendment to the United States Constitution. The case is moot because all of the equitable relief sought facially concerned the *1977 tax rolls* and 98% of the 1977 taxes with which the Plaintiffs were concerned have been collected as of the date of this brief. Furthermore, the Honorable Court should note that Petitioner Plaintiff herein *has not paid* the very taxes he is crying about herein.

The Defendants in this suit are Harris County, Texas, Carl S. Smith, Tax Assessor-Collector, and the five members of the Harris County Commissioners Court (Board of Equalization).

Plaintiff also claims in his brief from the Circuit that he is seeking to act herein, in part, as a private attorney general "pro bono publico." Alas, the would-be "attorney general" offered to settle the entire matter should defendant government cut *the auto dealers'* taxes to 50 cents on the dollar—pro malo publico. See the exhibit enclosed in this connection.

LIST OF ISSUES

1. **THE PLAINTIFFS' PLEA FOR EQUITABLE RELIEF IS MOOT.**
2. **THE STATE OF TEXAS IS AN INDISPENSABLE PARTY HERETO WITH SOVEREIGN IMMUNITY.**
3. **THE TRIAL COURT CORRECTLY ABSTAINED.**
4. **THE PLAINTIFF FAILED TO SEEK LOCAL STATUTORY REMEDIES ENACTED TO MEET THE ALLEGED WRONGS COMPLAINED OF.**
5. **THE STATE OF TEXAS HAS NOT TURNED A DEAF EAR TO PLEAS FOR TAX RELIEF.**

THE PLAINTIFF'S PLEA FOR EQUITABLE RELIEF IS MOOT

The Honorable Supreme Court must know that Plaintiff's claim for equitable relief is now moot. *DeFunis v. Odegaard,* 94 S.Ct. 1704-1707. Tom Gray, complaining herein through his closed corporation, Gray-Taylor, Inc., has complained in his original pleading about alleged defects in the 1977 State and County tax rolls. The State and County's 1977 tax plan has now been implemented and brought to fruition to the extent that 98% of the ad valorem taxes addressed therein have been collected. At this juncture it is revealed that the Plaintiff-Petitioner *has not yet paid the 1977* ad valorem taxes that he has been so grievously crying about from one end of Texas to the other, as well as to this Honorable Court. In this connection see the Government's exhibit attached hereto as to the percentage of the State's 1977 taxes collected, as well as the certificate of nonpayment of Plaintiff's taxes. Furthermore, plaintiff has paid his relevant prior years taxes *without protest.*

THE STATE OF TEXAS IS AN INDISPENSABLE PARTY HERETO WITH SOVEREIGN IMMUNITY

In this connection the record reveals that Plaintiff failed to sue several necessary and indispensable parties to this suit. Harris County is an arm of the State of Texas in all ways germane to this suit, and said unit of government also collects taxes for several other *separate and independent units of local government.* In Texas, the counties collect the State's ad valorem taxes and a significant amount of what Harris County collects is transmitted to the State Comptroller as purely State funds. All of these units are facially necessary in the context of the Plaintiff's action, but none were joined. See exhibits attached hereto. Please see *County of Harris v. Ideal Cement Company,* 290 F.Supp. 956 (S.D. Texas, 1968).

> "A determination of whether a state is a real party at interest is not based on the mere presence or absence of the state as a party of record, *but rather it is based on a consideration of the nature of the case as presented by the whole record.* See Ex parte State of Nebraska, 209 U.S. 436, 28 S.Ct. 581, 52 L.Ed. 876 (1908); De Long Corp. v. Oregon State Highway Comm'n., 233 F.Supp. 7 (D.Ore. 1964), aff'd, 343 F.2d 911 (9th Cir.), cert. denied, 382 U.S. 877, 86 S.Ct. 161, 15 L.Ed. 2d 119 (1965); Weyerhaeuser Co. v. State Roads Comm'n of Maryland, 187 F.Supp. 766 (D.Md. 1960). Courts making this determination have based their decisions on various circumstantial factors, such as (1) whether the state agency which is the party to the suit is an arm or alter ego of the state, (2) whether the subject matter involved is a governmental function as distinguished from a private right, and (3) *the pecuniary and beneficial interests of the*

> *state generally.* Weyerhaeuser Co. v. State Roads Comm'n of Maryland, 187 F.Supp. 766 (D.Md. 1960), see e.g., South Caroline State Ports Authority v. Seaboard Air Line R.R., 124 F.Supp. 533 (E.D.S.C. 1954) (Authority was arm of state); State of Indiana to the Use of Delaware County v. Alleghany Oil Co., 85 F. 870 (C.C.D.Ind. 1898) (preservation of natural resources is governmental function); People of State of California ex rel. McColgan v. Bruce, 129 F.2d 421, 147 A.L.R. 782 (9th Cir.), cert denied, 317 U.S. 678, 63 S.Ct. 157, 87 L.Ed. 544 (1944) (*suit to recover state income tax is to the beneficial interest of the state*). *Consideration of any one of these factors in the present case leads to the conclusion that the State of Texas is a real party at interest.*"
>
> [There are some especially salient footnotes in this case also] (Emphasis added)

The State of Texas is a crucial party at interest and is not subject to suit in Federal Court pursuant to many authorities, but especially *Edelman v. Jordan,* 94 S.Ct. 1347 (1974). This is not a civil rights suit of the type that does lie against the State such as set forth in *Fitzpatrick v. Bitzer,* 96 S.Ct. 2666 (1976). The Honorable Court's latest holding in *Monell v. City of New York,* 98 S.Ct. 2018 does not, of course, make the State of Texas a "person" under 42 U.S. Code 1983. The rationale of that cause has no application to the 50 States of this Union—"Our holding today is, of course, limited to local governmental units." It is quite beyond dispute that this cause as filed and amended in the Federal District Court as to the equitable relief and the damages sought was calculated to impact directly, among other things, *the Treasury of the State of Texas.*

THE TRIAL COURT CORRECTLY ABSTAINED

A principal issue at bar concerns the District Court's invocation of the Abstention Doctrine and rule of comity. Plaintiffs' Amended Complaint, though tardy, requested three basic types of relief: (1) an *injunction* preventing adoption and implementation of taxation scheme; (2) a *mandatory injunction* or *mandamus* to adopt a proper taxation scheme; (3) *damages,* measured by previously paid taxes. It must be stated now that under relevant State law taxes remitted *without* protest are not recoverable. Plaintiff has never paid any tax to the State of County under protest and as related above has yet to remit the 1977 personal property tax with which he is primarily concerned. The statute of limitations is two years for the claim for damages and enclosed herewith as an exhibit is a certificate of the tax collector that said pertinent taxes in relevant past years were paid in the usual course of business *without protest.* All of these revelations go back to the ruling of this Court in *DeFunis* (supra) wherein the Court said, "Federal courts are without power to decide questions that cannot affect rights of litigants before them."

The doctrines of abstention and comity now lie in a somewhat protean state and courts have had apparent difficulty drawing the various gossamer distinctions inherent in the field. Perhaps the clearest pronouncement in the area has come in *Colorado River Water Conservation District v. United States,* 96 S.Ct. 1236 (1976). Speaking for the Court, Mr. Justice Brennan distinguished three categories of abstention. These are: (1) *Pullman* type: cases in which a federal constitutional issue is presented which might be mooted or presented in a different posture by a state court's determination of

crucial state law. *Railroad Commission of Texas v. Pullman Co.,* 312 U.S. 496 (1941); *Harris County Commissioners Court v. Moore,* 420 U.S. 77 (1974). (2) *Burford* type—cases which present difficult state law questions which bear on policy problems of substantial public import whose importance transcends the results of the case at bar. For this type of abstention, it is enough that federal intervention would be disruptive of state efforts to establish a coherent policy. *Burford v. Sun Oil Co.,* 319 U.S. 315 (1943). (3) *Younger* type: cases where, absent bad faith, harrassment, or patently invalid state statute, federal jurisdiction is invoked to restrain state criminal proceeding, state nuisance proceedings, or collection of state taxes. *Younger v. Harris,* 401 U.S. 37 (1971); *Great Lakes Dredge and Dock Co. v. Huffman,* 319 U.S. 293 (1943).

Colorado River (supra) established a fourth type of abstention, although it did not call it abstention. Basically, this fourth type arises where there is a concurrent or parallel state court proceeding and the doctrine is invoked to avoid duplicative, wasteful litigation. However, to invoke abstention for this reason, the circumstances must be somewhat "exceptional" because of the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." Of course, this later corollary applies to all of the rules of abstention and is ever part of each decision.

The case at bar contains elements of each of the four categories discussed above. They are, (1) Plaintiffs' alleged violations of federal constitutional rights resulting from the State's taxation scheme. (The federal issues may well be mooted through the process of state proceedings). (2) the validity of the ad valorem tax system

presents difficult, yet unsettled, local questions—questions which are uniquely ones of Texas state law. The Federal Courts and Congress have regularly recognized that interference with state taxation would be disruptive of state efforts to establish a coherent policy. (3) Plaintiff's request for an injunction is clearly appropriate for abstention since it seeks to restrain the collection of state taxes. (4) Finally, this appears to be a proper case for abstention to avoid duplicative litigation. Here not only are the three factors discussed above present, but an identical class action filed by the same person through another closed corporation asking for the same relief was filed in state court prior to the filing of the Federal action. Plaintiff also is a member of the alleged interchangeable class in each case. Given the uniquely local nature of the issues involved and the fact that the existence of the federal issues depends upon the resolution of the circumlocuted state issues, this was and is a proper case for abstention.

Petitioners say, on page 6 of their Brief, that the 5th Circuit opinion herein suggests that discriminatory implementation of a local property tax plan is beyond Federal court review. Clearly, any time a Federal court abstains, a Plaintiff is denied immediate Federal court review, but the whole point of abstention is to allow the state courts to resolve the paramount state issues which removes the necessity to address the general Federal issues at the threshold. At the conclusion of state court proceedings, a Plaintiff may still appeal to the Federal System if there are any salient constitutional issues left. Thus, abstention absolutely does not deny ultimate Federal court review.

As Petitioner's Brief points out, the 5th Circuit opinion did not discuss the adequacy of the state law remedy. However, it has previously held in comparable cases that the Texas state remedies were adequate. *City of Houston v. Standard-Triumph Motor Company,* 347 F.2d 194 (1965), cert denied 382 U.S. 974 (1966). Furthermore the record below reveals that the circuit weighed exhaustive briefs on that subject. Petitioner's principal complaint appears to be that challenges to state property taxation in the state court generally have not been successful. State remedies need not be the best available or even equal to or better than the federal remedies in order to be "adequate." *Huffman v. Pursue, Ltd.,* 95 S.Ct. 1200 (1975); *Bland v. McHann,* 463 F.2d 21, 29 (C.A. 5th 1972), cert. denied 410 U.S. 966 (1973).

Petitioner's Supplemental Brief contends that the recent decision of the 7th Circuit in *Fulton Market Cold Storage Company v. Cullerton,* No. 77-2133 (1978), squarely conflicts with the 5th Circuit decision in case at bar. However, the two cases are distinguishable on their facts. In *Fulton Market,* Plaintiff filed his action in Federal court, *but there was no parallel state court proceeding seeking to litigate the same issue.* In the instant case, Petitioner is a member of the alleged class seeking exactly the same relief in state court. Furthermore, Tom Gray is the alter ego of the closed corporations filing and attempting to pursue the respective suits in State and Federal Court. Thus, present in this case is an important additional consideration for abstention not present in *Fulton Market.* Furthermore, the relevant state issues in *Fulton Market* were apparently not nearly so unsettled as the convoluted Texas law in this field.

Additionally, Plaintiff in *Fulton Market* sought only damages; in the instant case Petitioner originally sought only equitable relief and then as an after thought amended for damages. The principles underlying *Colorado River* type abstention or dismissal "rest on considerations of '[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation.' " *Colorado River Water Conservation Dist. v. United States, supra* at 817, *Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co.*, 342 U.S. 180, 183 (1952). These principles would indicate that in the case at bar the damage and injunction issues should be tried together and Plaintiff has pursued his State suit with vigor.

In *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 501 (1941), the Court discussed cases in which the federal courts did not intervene saying they

> "reflect a doctrine of abstention . . . whereby the federal courts, "*exercising a wise discretion,*" restrain their authority . . ." (emphasis added)

In *Burford v. Sun Oil Co.*, 319 U.S. 315, 332 (1943), the Court said that the federal court should exercise "equitable discretion" to give the state courts an opportunity to resolve the case. The Court stated that "[t]he District Court was . . . exercising a fair and well-considered *judicial discretion* in staying proceedings . . ." in *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.W. 25, 30 (1959). In *National Assn. for the Advancement of Colored People v. Bennett*, 360 U.S. 471 (1959) the Supreme Court remanded to the District Court for it to exercise its considered *discretion* as to whether abstention should be invoked.

Essentially abstention and comity are discretionary in nature, since the best panoramic view of a cause normally belongs to the trial forum. Generally, a Court of Appeals should only review district court judgments for errors of law and any *abuse of discretion* committed in concoction thereof. The burden of demonstrating an abuse of discretion allegedly committed by a District Court is on an appellant and the burden is a *peculiarly heavy one.* In fact, it has been said that if reasonable persons could differ as to the propriety of action taken by the trial court, then it cannot be said that the trial court abused its discretion. *Beshear v. Weinzapfel* (infra). In this cause the trial forum had the threshold duty to review all of the salient facets of the case as same related to the issue of abstention and comity. Clearly the paramount issues are not black and white, but indeed hinge on varying shades of gray. The issues were all well briefed and enough time was taken to weigh every nuance. In this connection see *Sheaffer v. Warehouse Union*, 408 F.2d 204 (D.C. Circuit 1969, Cert. Den. 89 S.Ct. 1996; *State Steamship Co. v. Philippines Airlines*, 426 F.2d 803 (Ninth Cir. 1970); *Beshear v. Weinzapfel*, 474 F.2d 127 (7th Circuit 1973,); *Charter Oak Insurance v. Mann*, 304 F.2d 166 (Eighth Circuit, 1962); *N.L.R.B. v. Gurnsey et al*, 285 F.2d 8 (6th Circuit 1960).

Some of the language of *Williams v. Rubiera*, 539 F.2d 470 (5th Circuit 1977, Rehearing en banc denied 544 F.2d 518, Cert. den. 431 U.S. 931) is especially apropos to the matter at bar. There the Court said:

"[discussing Younger v. Harris, 91 S.Ct. 746 (1971)]

> "Younger rested on the reciprocal doctrine of federal-state comity, the fundamental policy against

federal interference with state criminal prosecutions. . . .

[*note that such fundamental policy is comparable to the fundamental policy at bar against Federal injunctive interference with a local tax plan*]

"An injunction against a trial without appointed counsel would, of course, be direct federal interference in the state criminal prosecution. The issuance of only declaratory relief would not seem to alter the result. In Samuels v. Mackell, 401 U.S. 66, 91 S.Ct. 764, 27 L.Ed.2d 688 (1971), the Supreme Court held that those principles making federal injunctive relief impermissible would also apply to declaratory judgments.

"[O]rdinarily a declaratory judgment will result in precisely the same interference with and disruption of state proceedings that the long-standing policy limiting injunctions was designed to avoid. 401 U.S. at 72, 91 S.Ct. at 767. The Court found two reasons for this conclusions: (1) a federal court may need to grant further relief, such as a subsequent injunction, to effectuate the declaratory judgment; and (2) the declaratory judgment has practically the same impact on the state proceeding as a formal injunction.

The district court here recognized the impact declaratory relief could have. To grant the requested relief would have the intrusive impact on the state proceeding that Younger and its progeny abhorred.

"Plaintiff argues that Younger v. Harris has no application to this case since there is no opportunity to vindicate her constitutional rights in state court. The Supreme Court recognized that Younger 'presupposes the opportunity to raise and have timely decided by a competent state tribunal the federal

issues involved.' Gibson v. Berryhill, 411 U.S. 564, 577, 93 S.Ct. 1689, 1697, 36 L.Ed.2d 488 (1973). *Nothing in the record, however, indicates that the Florida state courts would not be the proper forum to fairly decide plaintiff's constitutional claims. This was the position taken by the district court. . . .*

"The need to allow state courts to adjudicate federal constitutional questions in cases pending before those tribunals is the workable result of comity and federalism. Unless a situation such as Gibson is present there is no reason to doubt that state courts can adequately entertain plaintiff's claims. Article VI of the United States Constitution 'declares that "the Judges in every State shall be bound" by the Federal Constitution, laws and treaties.' Huffman v. Pursue, Ltd., 420 U.S. 592, at 611, 95 S.Ct. 1200, 1211, 43 L.Ed.2d 482 (1975). *Thus the state courts share equivalently with the federal courts the responsibility of protecting constitutional guarantees.* See Schlesinger v. Councilman, supra, at 755-756, 95 S.Ct. 1300. *Absent facts to the contrary it must be presumed that this obligation will be fulfilled.*

"The concern of comity is not whether a state litigant would win or lose, but whether the claim to constitutional right would be fairly considered. This point was recognized by the Supreme Court in Huffman v. Pursue, Ltd., supra, at 608-611, 95 S.Ct. 1200." (Emphasis added)

THE PLAINTIFF FAILED TO SEEK LOCAL STATUTORY REMEDIES ENACTED TO MEET THE ALLEGED WRONGS COMPLAINED OF

In 1977, the Texas Legislature enacted Article 7345f, Tex. Rev. Civ. Stat. Said statute is enclosed herewith in the appendix and same became effective on June 16,

1977. The Plaintiff had plenty of time to utilize it. The statute has not been interpreted yet by any State Court, but its unequivocal terms allow great relief for taxpayers who can prove a valid case. The Plaintiffs elected to forego all of the potential relief existing under the new law and sought rather the tortuous route taken. Of course, the patent twists and turns encountered on that road would, to the uninitiated, seem to lend force to Plaintiffs' howls of local "foul." As stated by this Court in Huffman v. Pursue, Ltd., 95 S.Ct. 1200 (1975):

> "The concern of comity is not whether a state litigant would win or lose, but whether the claim to be constitutional right would be fairly considered."

It *is* the concern of comity and abstention that a complaining appellant at the present juncture has patently failed to avail himself of rational local remedies, and also has failed to refer this Court to such clearly germane statutes which stand paramount to prime issues herein.

THE STATE OF TEXAS HAS NOT TURNED A DEAF EAR TO PLEAS FOR TAX RELIEF

The Plaintiff herein has primarily based his action upon the allegation that the State and County knowingly omit large amounts of taxable personal property from the ad valorem tax rolls. They especially complain of the number of private automobiles and "intangibles" left off the rolls such as bank accounts, etc. The only arguable grounds for such a suit is that the Texas Constitution makes all such property taxable with only very limited exceptions. In other words, Texas could constitutionally categorize property subject to taxation and thus avoid equal protection and related claims, but to date they have not done so.

The Texas Legislature, in a special called session in the Summer of 1978, has finally addressed these and other problems. On November 7, 1978, the people of Texas will vote upon the proposed constitutional changes and all experts agree that the tax relief amendment will become law in the near future. Every official knows that within a very short time, *less than a year,* the Legislature will exempt from taxation all of the sort of personal property that tends to cause problems. This is especially so of household furniture not used commercially, private household automobiles not not used commercially, intangibles such as bank deposits, stocks and bonds, etc. Commercial personal property will remain taxable.

Generally speaking, it is obvious that taxing authorities at every level fail to tax *all* that is theoretically within their bailiwick. The experts agree that as to the Federal Income Tax, there is a huge "underground" economy in the United States consisting of billions of dollars in taxable income which completely escape I.R.S. scrutiny. All of the defenses which would be raised by the I.R.S. in the context of their known failures are the very same, generally speaking, that are raised by local governments in suits such as the one at bar. That is, the success of the system rests primarily upon *voluntary* compliance coupled with a reasonable governmental ability to punish the evader. In this connection Defendants have attached hereto the 1977 Ad Valorem Tax Plan For Harris County, along with all of the newly proposed constitutional amendments for the State of Texas. The new

amendments clearly will help solve some of the State's lingering problems in this field. To the extent that this Court concerns itself with the "overview," Texas is on the final road to solving many of its ad valorem tax problems.

CONCLUSION

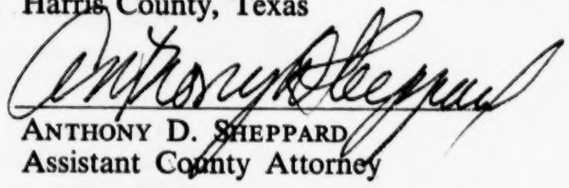
The weight of the record from below clearly denotes that the District Court and the Fifth Circuit Court of Appeals carefully weighed the issues of abstention and comity, including the "damages plea," and in their discretion, based upon the totality of the law and evidence, decided against Plaintiff herein. Those courts were wholly correct and no abuse of discretion by any officer has been shown within or without the record.

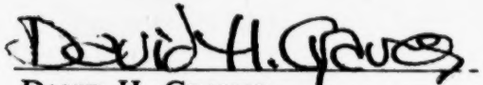
The issue of mootness arises only if the Court wishes to reach it, and if the Court does reach it, then the holding should be in Defendants' favor. The issue of sovereign immunity under the Eleventh Amendment arises only if the Court wishes to reach it, and if the Court does reach it, then the holding should be that the State of Texas is a necessary and indispensable party to this action and is immune from suit herein. Said sovereign is not a "person" under 42 U.S. Code 1983 and is not subject to suit in Federal Court under any other relevant law and the totality of the circumstances of this case.

WHEREFORE, PREMISES CONSIDERED, Writ of Certiorari should be in all ways *Denied* and the lower Court's decision *Affirmed.*

Respectfully submitted,

JOE RESWEBER
County Attorney
Harris County, Texas

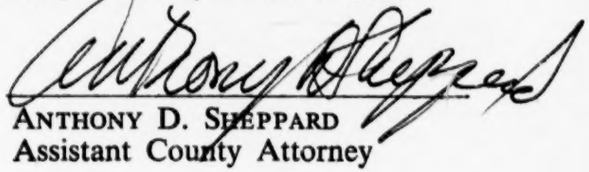
By: 
ANTHONY D. SHEPPARD
Assistant County Attorney

By: 
DAVID H. GRAVES
Assistant County Attorney
1001 Preston, Suite 364
Houston, Texas 77002
(713) 221-5101

Attorneys for Respondent

CERTIFICATE OF SERVICE

I certify that a true copy of this instrument and all related materials was mailed to opposing counsel at 28th Floor, 1100 Milam Street, Houston, Texas 77002.



ANTHONY D. SHEPPARD
Assistant County Attorney

ADOPTION OF PLAINTIFF'S APPENDICES

Now comes Defendants-Respondents and said parties adopt the Plaintiff-Petitioner's Appendices consisting of the District Court's Judgment, the Magistrate's Recommendation to the District Court, the Fifth Circuit's Per Curiam Affirmance, the Fifth Circuit's Denial of Rehearing, and the Fifth Circuit's Judgment.

JOE RESWEBER
County Attorney
Harris County, Texas

ANTHONY D. SHEPPARD
Assistant County Attorney
1001 Preston, Suite 364
Houston, Texas 77002
(713) 221-5101

EXHIBITS

No. 1—Letter from Plaintiff's Attorney offering to settle the action for 50 cents on the dollar.

No. 2—Tax Collector's Certificate showing percentage of State and Local Taxes collected under the 1977 Plan.

No. 3—Certificate showing Plaintiff has not paid his 1977 personal property taxes.

No. 4—Certificate showing Plaintiff has paid his relevant prior years taxes *without* protest.

No. 5—Copy of Article 7345f, Tex. Rev. Civ. Stat.

No. 6—Copy of Harris County's 1977 Ad Valorem Tax Plan.

No. 7—Tax Collector's Discussion of New Constitutional Amendment.

EXHIBIT NO. 1

CHAMBERLAIN, HRDLICKA, WHITE & WATERS
Attorneys at Law
28th Floor
1100 Milam Street
Houston, Texas 77002

Area Code 713
657-1818

August 2, 1977

Joe G. Resweber, Esq.
County Attorney
301 San Jacinto, Room 202
Houston, Texas 77002

Re: C.A. No. H-77-949; Gray Taylor, Inc., et al. v. Harris County, et al. and No. 1,131,363; T. G. Motors, Inc. of Houston d/b/a Tom Gray Datsun v. Carl S. Smith, et al. 164th Judicial District Court, Harris County.

Dear Mr. Resweber:

Pursuant to our telephone conversation of today, we propose to settle this litigation on the following basis: All personal property of the automobile dealers in Harris County will be assessed for the current year at 50% of inventory or other cost (prior to application of the appropriate 32% assessment figure), and, barring the establishment of new procedures for including all property on the tax rolls, it is understood that this basis for taxation will continue indefinitely into the future.

As I noted to you, we feel this settlement can be justified under present practices actually employed by the Tax Assessor for equalizing personal property taxes. In this regard, you might consider Mr. Smith's deposition testimony as to how he has "equalized" his own personal

property tax renditions in prior years. Moreover, significant recent developments suggest to us that the Defendants in this litigation may not have considered its ramifications.

We request a conference attended by all persons in a position of authority to settle these cases. We suggest a date of August 8, 1977. We will be prepared at this conference to develop in detail the various considerations which we feel support this settlement and make it acceptable to the Defendants.

As I finally noted to you, we feel that this will be the last realistic opportunity to pursue a settlement. If this attempt at settlement fails, the matter will be litigated to a final conclusion.

Sincerely yours,

/s/ JOHN A. TOWNSEND
John A. Townsend

JAT/cf

EXHIBIT NO. 2

STATE OF TEXAS §
§
COUNTY OF HARRIS §

This is to certify that I, Carl S. Smith, Tax Assessor-Collector in and for the State of Texas, County of Harris, am required by State Law to assess and collect taxes for the State of Texas and Harris County and Harris County-Wide Districts.

Detailed below are the total state taxes levied for 1977 and the total collections to date with the approximate percentage of collections which have been collected and reported to the various authorities.

Also listed are the County and County-Wide Districts showing the amount of taxes charged and the approximate amount of collections to date with the percentage of collections to date.

	Total Charged To The Roll	Total Collections To Date	Percentage of Collections
State	$ 10,468,944.25	$ 10,182,131.00	98.00%
County & County-Wide Districts			
County §			
Port Authority §			
School Equalization §			
Flood Control §			

Hospital §			
San Jacinto J.C. (Junior College) §			
North Harris County §			
J.C. (Junior College) §	$198,211,275.63	$194,290,517.00	98.00%

I hereby certify that the above is true and correct according to the records of the Harris County Tax Office as of the 5th day of October, 1978.

/s/ CARL S. SMITH
Carl S. Smith
Tax Assessor-Collector
Harris County, Texas

Subscribed and sworn to before me this 5th day of October, 1978.

/s/ BETTY SHEPHERD
Notary Public in and for
Harris County, Texas

SEAL

EXHIBIT NO. 3

Office of
CARL S. SMITH
Assessor and Collector of Taxes
Harris County
Houston, Texas 77002

October 5, 1978

STATE OF TEXAS §
§
COUNTY OF HARRIS §

This is to certify that the records of the Harris County Tax Office reflect that the *1977* taxes on Gray-Taylor, Inc., d/b/a "Jimmy Green Chevrolet" are due and unpaid in the amount shown on the attached statement.

/s/ CARL S. SMITH
Carl S. Smith
Tax Assessor-Collector
Harris County, Texas

SEAL

CARL S. SMITH
Assessor and Collector of Taxes, Harris County
HOUSTON, TEXAS
Phone 224-1919, Sta. 291

Statement of Tax due, as shown by the Delinquent Tax Records of Harris County, Texas

(Accts 66-26235)

ACCOUNT NO. Vol.	Page	Sub.	Item
(Acct			)

NAME, ADDRESS AND PROPERTY DESCRIPTION
GREEN, JIMMIE CHEVROLET
P O BOX 34009
HOUSTON, TEX. 77034
2611 S SHEPHERD

To Whom Assessed as Shown by Tax Records PAGE NO. LINE NO.	Years Delinquent	STATE TAX	Penalty and Interest	County & County Wide Districts Tax	Penalty and Interest	Drainage District	Penalty and Interest	Jr. College School or Village	Penalty and Interest		PERSONAL PROPERTY	Costs	TOTALS OF EACH YEAR
P-17660	1977	1287.19	160.90	23,684.30	2960.54						VALUE - 1,287,190	–	28,092.93
TOTALS													

STATE COST	
TOTAL THIS PAGE	
TOTAL FORWARDED	
TOTAL DELINQUENT TAX DUE (With Penalty, Interest and Cost)	
PAY THIS AMOUNT ➡	28,092.93

STATE OF TEXAS }
County of Harris } I hereby certify that the above Statement of Delinquent Taxes due and unpaid in this County is true and correct according to the Rolls and Delinquent Tax Records in this, Harris County, Texas.

In testimony whereof, witness my hand and seal of office this 3rd day of Oct 1978

CARL S. SMITH
Assessor and Collector of Taxes of Harris County, Texas

By [signature] Deputy

PLEASE NOTE

INTEREST AND PENALTY FIGURED TO OCT 31 1978 197__
ADDITIONAL CHARGES AFTER THIS DATE

THIS IS NOT A RECEIPT

PLEASE RETURN THIS STATEMENT WITH REMITTANCE

EXHIBIT NO. 4

Office of
CARL S. SMITH
Assessor and Collector of Texas
Harris County
Houston, Texas 77002

October 12, 1978

The Honorable Joe Resweber
County Attorney
Harris County
Houston, Texas 77002

Attention: Mr. Anthony Sheppard

In re: 1975 Personal Property Taxes
Acct. No. 1-00-26235-1
1976 Personal Property Taxes
Acct. No. 2-00-26235-0
"Gray-Taylor, Inc.," d/b/a
Jimmie Green Chevrolet

Dear Sir:

We have reviewed our records for the years 1975 and 1976 on the above accounts, and we find no notation which reflects that the payments were made under protest.

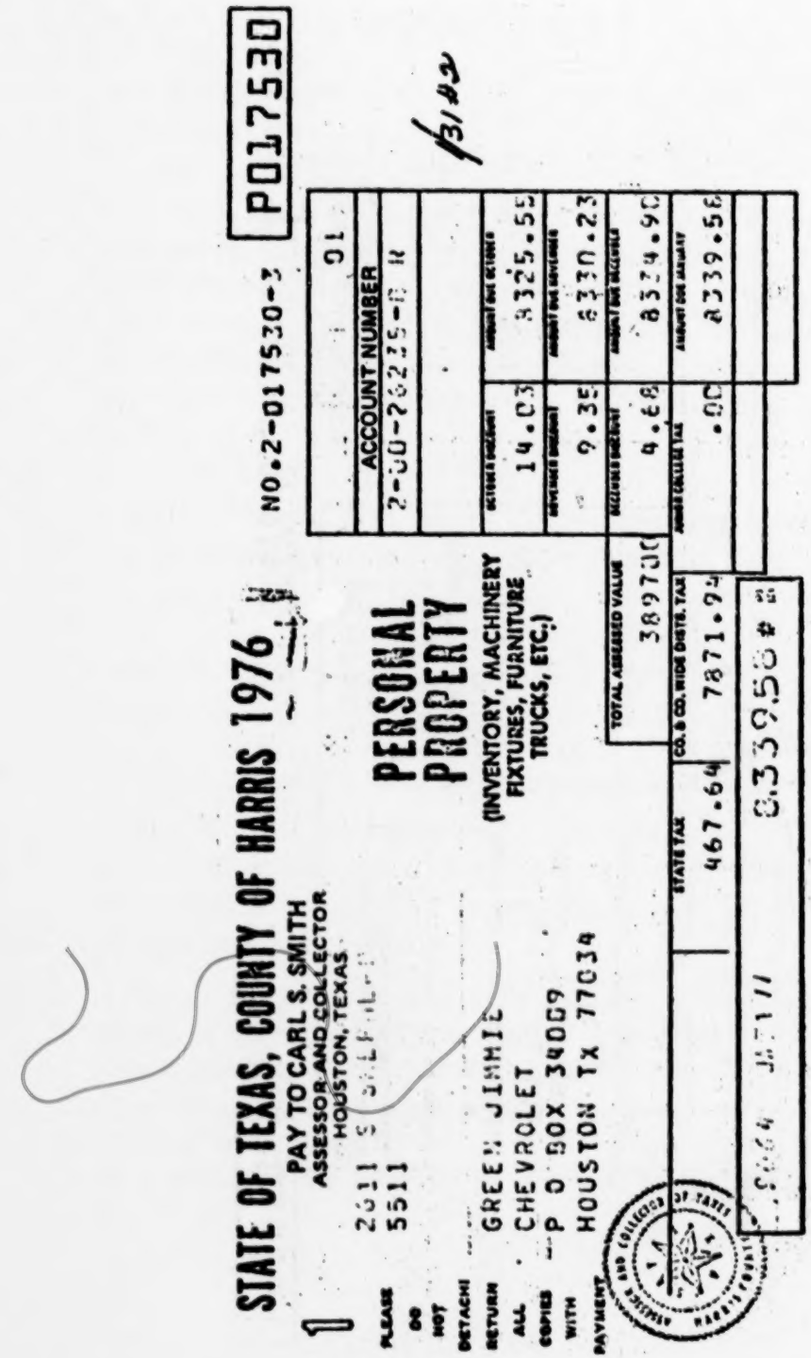
Attached are copies of the receipts for each of these years.

Yours very truly,

/s/ CARL S. SMITH
Carl S. Smith
Tax Assessor-Collector
Harris County, Texas

CSS:bs
Attachments

SEAL



STATE OF TEXAS, COUNTY OF HARRIS 1975

CARL S. SMITH
ASSESSOR AND COLLECTOR
HOUSTON, TEXAS

HOUSTON

PD18264

PERSONAL PROPERTY
(INVENTORY, MACHINERY FIXTURES, FURNITURE TRUCKS, ETC.)

ACCOUNT NUMBER 1-00-26235-1

PLEASE DO NOT DETACH BELOW ALL COPIES WITH PAYMENT

GREEN JIMMIE
CHEVROLET
P O BOX 39009
HOUSTON TX 77034

2411 S SHEPHERD

TOTAL ASSESSED VALUE 23,340

STATE TAX 284.49

CO. & CO. WIDE DEBT. TAX 472.55

EXHIBIT NO. 5

Art. 7345f. Right of appeal by property owner

Time for filing petition for review

Section 1. A property owner is entitled to appeal a decision of any board of equalization to a district court of the State of Texas. A party who appeals to a district court must file a petition for review with the district court within 45 days after the tax roll containing the value involved is approved by the taxing authority.

Venue

Sec. 2. Venue is in the county in which the board of equalization that made the decision is located.

Trial by jury

Sec. 3. Any party is entitled to a trial by jury on demand.

Value of property fixed

Sec. 4. (a) The issue to be determined by the district court in an appeal is whether or not the value of the property in question as ascertained by the board of equalization is in error.

(b) If the court or jury finds that the value as ascertained by the board of equalization is in error, meaning it is higher than the value set out by the property owner in a rendition filed prior to the board of equalization hearings as required by law, then the court or jury shall fix a value for the property in question as of January 1

of the tax year in controversy. In fixing the value of the property in question, the court or jury shall determine the cash market value and multiply that value by the assessment ratio, if any, in effect for the taxing authority involved.

(c) The value affixed by the court or jury pursuant to Subsection (b) above shall be binding on the taxing authority or authorities involved in the lawsuit for the tax year in question and for the succeeding tax year. However, in the succeeding tax year the taxing authority may add the value of subsequent improvements to the property, if any, to the value affixed by the court or jury.

Defense to appeal

Sec. 5. When established by a preponderance of the evidence, it shall be a defense to an appeal under this article that the taxpayer failed to exercise good faith in estimating the cash market value set out in the rendition required in Subsection (b) of Section 4 of this article. A taxpayer does not fail to exercise good faith for purposes of this section if he makes a good faith effort to estimate the cash market value of the property and the assessment ratio, if any, in effect for the taxing authority and renders the value determined by multiplying his estimate of cash market value by the assessment ratio. A taxpayer shall be required to file with the board of equalization a sworn affidavit, in addition to the rendition, prior to invoking the provisions of this article but shall not be required to appear personally or by a representative.

Rights cumulative

Sec. 6. The rights afforded taxpayers under this article are cumulative and do not preempt other remedies granted by statute or evolving by common law.

Injunctive or restraining order relief

Sec. 7. The cause of action herein granted does not expand upon taxpayers' rights to sue for an injunction or restraining order as a member of a class. Rights granted hereunder are specifically prohibited from being the basis of injunctive or restraining order relief in a class action suit seeking to enjoin the putting into effect of a tax plan of a taxing authority.

Added by Acts 1977, 65th Leg., p. 1912, ch. 764, eff. June 16, 1977.

EXHIBIT NO. 6

(S E A L)

OFFICE OF
CARL S. SMITH
Assessor and Collector of Taxes
HARRIS COUNTY
Houston, Texas 77002

HARRIS COUNTY'S
AD VALOREM TAX PLAN

I will put all property, real and personal, on the Harris County Tax Rolls where, in my discretion and opinion, I have enough legal data to do so. In the case of real property, the county and state have an automatic lien on such property, whether or not, generally speaking, we know who owns or claims title to same.

In the case of personal property, which for the most part is movable and in a constant state of flux, we have no such lien, and more and better data as to ownership is necessary before a valid collectible assessment can be made.

In the case of taxes on all property, real and personal, I must depend largely upon voluntary rendition of the property by the taxpayer.

If there is no rendition, then at the appropriate time of year, I must attempt to assess as much taxable property as I can subject to the exemptions allowed by law.

To have a valid assessment, in my opinion and discretion, I must have the following data or a reasonable expectation of getting it on a timely basis:

(1) The name of the owner of the subject personal property on *January 1st* of the subject year.

(2) What is the subject personal property by reasonable description.

(3) What is the value of the subject property on January 1st of the subject year.

(4) Where was the subject property on January 1st of the subject year or where was the domicile of the owner on January 1st of the subject year. The situs of the property as of January 1st is largely controlling.

(5) What is the valid address of the owner of the subject property so that a tax bill can be sent to said person with reasonable expectation of receipt.

(6) How can the owner be contacted to verify needed data if some of the above data is not readily known.

All of this data, or most of this data, is needed to lawfully assess personal property where there is no rendition because the county does not have a lien on personal property for taxes. That is, in the case of real estate we do not require the data above to the same extent that it is required of personal property, because the assessment of real property, simply and generally stated, constitutes an automatic lien or cloud upon the title to the subject real property.

The Constitution of Texas makes all non-exempt property taxable but the Constitution is not self enacting

in this regard. I must look to the various pertinent statutes to determine methods and subjects of taxation.

Various legal categories of taxable property are set by statute. It is true that all non-exempt personal property is taxable, but nevertheless various categories of property are established by the code.

For example, as a recent lawsuit is concerned, Article 7148, Vernon's Civil Statutes, provides for the handling of "merchandise" of corporations, partnerships, etc. In view of this statute and related statutes, the Tax Office has found it efficient to manage business type tax accounts differently to some degree from the other types of accounts. While not all businesses have an "inventory" per se, as a practical matter most "businesses" do have an inventory of some sort carried as such or in connection with such businesses. For instance a barbershop offers a "service" but probably has an inventory as well. A medical doctor may offer services, but might well dispense drugs or what would be considered inventory in a technical sense, such as medical supplies, etc. A lawyer may, as part of his service, and though not billed as such, hold an inventory of paper and supplies and such used in his profession. For these reasons, the tax office gathers data for "businesses", as well as all other property, since in our opinion the law categorizes them for some tax purposes.

Data is easier to acquire for merchandise businesses. Ownership is normally a matter of public record and businesses are largely open to the public for inspection without a warrant or other process. Most businesses are eager to *render* their property so that their opinion of market value of the subject property will be considered

by the assessor. The necessary data for assessment as above set forth is readily available for most of the 50,000 or more businesses in Harris County, but it is not readily available for the hundreds of thousands of non-business taxpayers in the county. I am relegated especially to renditions in the field of personal property of private individuals because my accurate data sources are very limited in that field. I will put all property on the rolls that is rendered and I will assess all property for the rolls where I can in my opinion and discretion acquire enough valid data to assess same and send out a bill with a reasonable expectation of receipt.

A tax bill is considered by law to be a mere courtesy to the taxpayer, but in the case of a nonrendering personal property taxpayer, it is crucial for any hope of collection because there is no tax lien on personal property and certainly no such taxes will be paid if no bill is received. Title to personalty cannot be meaningfully clouded by merely establishing a tax roll of personalty and the roll is a worthless and wasteful thing without a lien on personalty or without the crucial data necessary to have a reasonable expectation of collection.

Timely valid data is the key to valid assessment of personal property and without good data the tax assessor is quite hindered in his duty. In my opinion I place all property on the rolls that has been rendered or which I can validly assess based upon available data. Blind assessment is not required and in my discretion I will not engage in it. Furthermore, practices of other taxing units in this regard are questionable in my opinion in many respects, because without question much if not most non real property owners escape their taxes on much personal property.

My oath requires that I view and tax all non-exempt property in the county "as fully as may be practicable" and my staff and I do not, have not and will not under my administration, violate that oath or any other lawful oath.

/s/ CARL S. SMITH
Carl S. Smith
Assessor-Collector of Taxes

This plan written on four (4) pages and presented to the Board and Court this day has been promulgated as an aid to the Board. It is not and shall not be taken to be controlling as to any given nuance of the operations of my office and certainly exceptions exist to all general plans. This plan shall never constitute an admission, waiver or estoppel in any respect whatever and is a general statement made by the Tax Assessor-Collector's Office in his executive capacity.

EXHIBIT NO. 7

STATE OF TEXAS §
§
COUNTY OF HARRIS §

EXHIBIT

Attached herewith is a copy of the Text of House Bill 18, enacted during the Second Called Session, 65th Texas Legislature, which requires cities and other political subdivisions of the State to follow prescribed procedures related to tax levy increases and property reappraisals.

One of the highlights of House Bill 18, is Section 2, which states, "A taxing unit may not impose property taxes in any year until the governing body has adopted a tax rate for that year, . . .".

House Bill 18, commonly called "Truth in Taxation", has various other requirements which are in the interests of the taxpayer, all of which have been underscored.

Attached also is a copy of House Joint Resolution 1, commonly called the *"Tax Relief Amendment of 1978"* which will be voted on November 7 and is a very far reaching resolution that will "mandate" some exemptions and "authorize" others that will be beneficial to the general public. *This is especially so of "intangibles"—bank accounts, bonds, etc.*

Section 1 provides among other things—"The Legislature by general law shall exempt household goods not held or used for the production of income . . .". It was intended when the present Constitution was adopted for most household goods to be exempt but due to a limitation which was placed in our Constitution more than 100

years ago, most household furniture was subject to taxation. House Joint Resolution 1 would mandate this exemption.

Section 1 further states that "The Legislature by general law may exempt all or part of the personal property homestead of the family or single adult, 'personal property homestead' meaning that personal property exempt by law from forced sale for debt . . .". This provision has been construed to mean that the Legislature may exempt *personal motor vehicles* from property tax which is a form of tax relief that will help the average citizen.

Another feature of House Joint Resolution 1 is the provision in Section 1-D-1 (a) which states that "To promote the preservation of open-space land, the Legislature shall provide by general law for taxation of open-space land devoted to farm or range purposes on the basis of its productive capacity . . .".

This section would be very beneficial to the farming community inasmuch as the assessor would be required to assess according to productivity of the land.

/s/ CARL S. SMITH
Carl S. Smith
Tax Assessor-Collector
Harris County, Texas

TEXT OF H.B. 18—Truth In Taxation

* * *

. . . The assessor shall publicize that rate in a manner designed to come to the attention of all residents and submit the rate to the governing body of the unit.

SECTION 2. LIMITATIONS ON INCREASING EFFECTIVE RATE. A taxing unit may not impose property taxes in any year until the governing body has adopted a tax rate for that year, and the governing body may not adopt a tax rate that exceeds the rate calculated and announced under Section 1 of this Act by more than three percent until it has given public notice of its intention to adopt a higher rate and has held a public hearing on the proposed increase.

SECTION 3. NOTICE AND PUBLIC HEARING ON INCREASE. [a] A public hearing required by this Act may not be held before the seventh day after the date the notice of intent to increase the tax rate is given. The hearing must be on a weekday that is not a public holiday and must begin after 5 p.m. and before 9 p.m. The hearing must be held in a public building inside the geographical boundaries of the taxing unit. If no public building is available, the hearing may be held in some other suitable building inside the geographical boundaries of the unit. At the hearing, the governing body must afford adequate opportunity for proponents and opponents of the tax increase to present their views.

[b] The notice of a public hearing may not be smaller than one-quarter page of a standard-size or a tabloid-size newspaper, and the headline on the notice must be in 18-point or larger type. The notice must be in the following form:

"NOTICE OF TAX INCREASE

"The [name of the taxing unit] proposes to increase your property taxes by [percentage of increase over the rate submitted under Section 1 of this Act] percent.

"A public hearing on the increase will be held on [date and time] at [meeting place].

"[Names of all members of the governing body, showing how each voted on the proposal to raise taxes and, if one or more were absent, indicating the absences.]"

[c] The notice may be mailed by first-class mail to each registered voter residing in the unit or it may be published in a newspaper. If the notice is published in a newspaper, it may not be in the part of the paper in which legal notices and classified advertisements appear.

SECTION 4. ADOPTION OF INCREASED TAX RATE. (a) At the public hearing the governing body shall announce the date, time, and place of the meeting at which it will vote on the proposed tax increase. After the hearing it shall give notice of the meeting in the form and manner provided by Section 3 of this Act, except that the second paragraph of the notice must state:

"A public meeting to vote on the proposed increase will be held on [date and time] at [meeting place]."

[b] The meeting to vote on the increase may not be earlier than the 3rd day or later than the 14th day after the date of the public hearing. The meeting must be held in a public building inside the geographical boundaries of the taxing unit. If no public building is available, the meeting may be held in some other suitable building inside the geographical boundaries of the unit. If the governing body does not adopt the increase by the 14th

day, it must give a new notice under Subsection [a] of this section before it may adopt a rate higher than that announced under Section 1 of this Act.

* * *

SECTION 5. NOTICE OF REAPPRAISAL. [a] Not later than the 20th day before the date the board of equalization for a taxing unit begins holding public hearings, the assessor for the unit shall mail a written notice to each property owner whose property value has been increased by more than $100 above its value in the preceding year.

The assessor shall include in the notice:

[1] the value of the property in the preceding year;

[2] the amount of taxes imposed on the property the preceding year;

[3] the value of the property for the current year; and

[4] the amount of taxes that will be imposed on the basis of that value if neither the tax rate nor the ratio of assessment in effect for the unit in the preceding year is reduced.

TEXT OF H.J.R. 1—The Tax Relief Amendment Of 1978

* * *

. . . *It may also tax incomes of both natural persons and corporations other than municipal, except that persons engaged in mechanical and agricultural pursuits shall never be required to pay an occupation tax.*

The Legislature by general law shall exempt (Provided, that two hundred and fifty dollars worth of) household goods not held or used for the production of income and personal effects not held or used for the production of income, and the Legislature by general law may exempt all or part of the personal property homestead of a family or single adult, "personal property homestead" meaning that personal property exempt by law from forced sale for debt, (and kitchen furniture, belonging to each family in this State shall be exempt) from *ad valorem* taxation.

* * *

Sec. 1-d-1. [a] To promote the perservation of open-space land, the legislature shall provide by general law for taxation of open-space land devoted to farm or ranch purposes on the basis of its productive capacity and may provide by general law for taxation of open-space land devoted to timber production on the basis of its productive capacity. The legislature by general law may provide eligibility limitations under this section and may impose sanctions in furtherance of the taxation policy of this section.

* * *

Sec. 21. [a] Subject to any exceptions prescribed by general law, the total amount of property taxes imposed by a political subdivision in any year may not exceed the total amount of property taxes imposed by that subdivision in the preceding year unless the governing body of the subdivision gives notice of its intent to consider an increase in taxes and holds a public hearing on the proposed increase before it increases those total taxes. The legislature shall prescribe by law the form, content, timing, and methods of giving the notice and the rules for the conduct of the hearing.

* * *

(c) The legislature by general law shall require that, subject to reasonable exceptions, a property owner be given notice of a revaluation and of the amount of taxes that will result from the reappraised value if neither the tax rate nor the ratio of assessment in effect in the preceding year is reduced. The notice must be given before the procedures required in Subsection [a] are instituted.

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[b] Administrative and judicial enforcement of uniform standards and procedures for appraisal of property for ad valorem tax purposes, as prescribed by general law, shall originate in the county where the tax is imposed, except that the legislature may provide by general law for political subdivisions with boundaries extending outside the county.